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CASES CITED.

APPENDIXES.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 330.

DAYTON-GOOSE CREEK RAILWAY COMPANY, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Whether an adequate system of railway transportation throughout the continental United States shall be maintained and to that end whether the Transportation Act of 1920 is a valid exercise of Congressional power is the question.

Whether a particular clause of that act is constitutional when torn from its setting is decidedly *not* the question.

The act stands before the court with all of the presumptions of validity (*Nicol* v. *Ames*, 173 U. S. 509, 512). Moreover, the act has thrice been sus-

tained in practically all of its aspects in as many opinions of this court (*Railroad Commission of Wisconsin* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *Pennsylvania Railroad* v. *Railroad Labor Board*, 261 U. S. 72; *New England Divisions Case*, 261 U. S. 184). Few cases in the last decade were of greater moment and it may be fairly assumed that this court gave to each the great care and due deliberation which their exceptional importance demanded In undertaking now to overthrow and destroy that act the appellant and all of those who stand with it have not only assumed a heavy burden but a grave responsibility.

Dayton-Goose Creek Company alleges itself to be a common carrier by railroad subject to "the lawful provisions of the Transportation Act of 1920, * * * and all other lawful acts of Congress regulating railroads engaged in interstate and foreign commerce." (Tr. 2.) Congress, therefore, has the power to regulate it. (*St. Louis Southwestern* v. *United States*, 245 U. S. 136, 142; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186.)

Exhibits A (Tr. 19) and B (Tr. 22) are orders of the Commission which appear to have been prepared for all of the carriers, and direct each carrier to report to the Commission, among other things, the amount by which the net railway operating income, as defined in paragraph 1 of section 15a, for the year ending December 31, 1921, was in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation; and where it

reports excess net railway operating income, the title of the fund account in which one-half of such excess was placed, the date when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held, and the amount of the remaining one-half of the excess income, as preliminarily computed, paid to the Commission and when and how such amount was paid.

In response to each order appellant made the report called for and accompanied it with what is called a protest (Tr. 24, 28)—the substance of which protest is that section 15a, which is also section 422 of the Transportation Act of 1920, is unconstitutional.

It is not denied that appellant holds $27,716.61 (one-half of $21,666.24, for 10 months ended Dec. 31, 1920, or $10,833.12; and one-half of $33,766.99 for year ended Dec. 31, 1921, or $16,883.49) (Tr. 6, 34), which it must deliver over to the Commission if its case fails as it did in the District Court.

The prayer of the original petition is that "the said orders of the Commission, and each of them, so far as they relate to the payment of money to the Commission and into said reserve fund," shall be stayed and suspended, and that the defendants be enjoined from instituting or prosecuting any civil or criminal suit or suits against complainant or any of its officers or directors, or either of them jointly or severally, until complainant can present to the court application for injunction, etc. (Tr. 17.)

The original petition had two objects: First, to annul and enjoin orders of the Interstate Com-

merce Commission; second, to enjoin the Commission and the United States Attorney from compelling obedience to the act.

Circuit Judges Walker and King and District Judge Foster sustained the motion of the United States to dismiss with a full opinion and final decree. (287 Fed. Rep. 728.) There are 28 assignments of error but the single question is one of constitutional power and that only. The whole proceeding is in the nature of a demurrer to Section 422 of the Transportation Act of 1920.

II.

THE TRANSPORTATION ACT.

The Transportation Act is entitled, "An act" (*a*) "to provide for the termination of Federal control * * *"; (*b*) "to provide for the settlement of disputes between carriers and their employees;" (*c*) "to further amend" the act to regulate commerce of 1887, as amended (41 Stat. 456), approved February 28, 1920. It consists of five titles, viz, I.—Definitions; II.—Termination of Federal control; III.—Disputes between carriers and their employees and subordinate officials; IV.—Amendments to interstate commerce act; V.—Miscellaneous provisions.

The broad purposes of the act are repeatedly recited, thus: In order "to best promote the service in the interest of the public and the commerce of the people" (41 Stat. 476, 477); to "best meet the emergency and serve the public interest," * * * "properly to serve the public" (41 Stat. 477); "that

the public interest will be promoted" (41 Stat. 482); to consider "the transportation needs of the country" (41 Stat. 488); to meet the necessity of enlarging the facilities "in order to provide the people of the United States with adequate transportation" (41 Stat. 488); "in the interest of the commerce of the United States as a whole" (41 Stat. 489); to enable the carriers "properly to meet the transportation needs of the public" (41 Stat. 491).

Section 422 of the Transportation Act of 1920 is as follows (41 Stat. 488):

> SECTION 422. The Interstate Commerce Act is further amended by inserting after section 15 a new section to be known as section 15a and to read as follows:[1]
>
> * * * * *
>
> (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a

[1](1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term "carrier" means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (a) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term "net railway operating income" means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

* * * * *

(8) Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway

whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, struc-

property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose.

(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

(10) The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided. Any moneys in the fund not so employed shall be invested in obligations of the United States or deposited in authorized depositaries of the United States subject to the rules promulgated from time to time by the Secretary of the Treasury relating to Government deposits.

(11) A carrier may at any time make application to the Commission for a loan from the general railroad contingent fund, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation, as the Commission may deem pertinent to the inquiry.

(12) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan from the general railroad contingent fund is necessary

tures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service

to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan, the Commission may make a loan to the applicant from such railroad contingent fund, in such amount, for such length of time, and under such terms and conditions as it may deem proper. The Commission shall also prescribe the security to be furnished, which shall be adequate to secure the loan. All such loans shall bear interest at the rate of 6 per centum per annum, payable semiannually to the Commission. Such loans when repaid, and all interest paid thereon, shall be placed in the general railroad contingent fund.

(13) A carrier may at any time make application to the Commission for the lease to it of transportation equipment or facilities, purchased from the general railroad contingent fund, setting forth the kind and amount of such equipment or facilities and the term for which it is desired to be leased, the uses to which it is proposed to put such equipment or facilities, the present and prospective ability of the applicant to pay the rental charges thereon and to meet the requirements of its obligations under the lease, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of leasing such equipment or facilities to the applicant as the Commission may deem pertinent to the inquiry.

(14) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the leasing to the applicant of such equipment or facilities, in whole or in part, is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant is such as to furnish reasonable assurance of the applicant's ability to pay promptly the rental charges and meet its other obligations under such lease, the Commission may lease such equipment or facilities purchased by it from the general railroad contingent fund, to the applicant for such length of time, and under such terms and conditions as it may deem proper. The rental charges provided in every such lease shall be at least sufficient to pay a return of 6 per centum per annum, plus allowance for depreciation determined as provided in paragraph (5) of section 20 of this Act, upon the value of the equipment or facilities leased thereunder. All rental charges and other payments re-

of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such deter-

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ceived by the Commission in connection with such equipment and facilities, including amounts received under any sale thereof, shall be placed in the general railroad contingent fund.

(15) The Commission may from time to time purchase, contract for the construction, repair and replacement of, and sell, equipment and facilities, and enter into and carry out contracts and other obligations in connection therewith, to the extent that moneys included in the general railroad contingent fund are available therefor, and in so far as necessary to enable it to secure and supply equipment and facilities to carriers whose applications therefor are approved under the provisions of this section, and to maintain and dispose of such equipment and facilities.

(16) The Commission may from time to time prescribe such rules and regulations as it deems necessary to carry out the provisions of this section respecting the making of loans and the lease of equipment and facilities.

(17) The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

(18) Any carrier, or any corporation organized to construct and operate a railroad, proposing to undertake the construction and operation of a new line of railroad may apply to the Commission for permission to retain for a period not to exceed ten years all or any part of its earnings derived from such new construction in excess of the amount heretofore in this section provided, for such disposition as it may lawfully make of the same, and the Commission may, in its discretion, grant such permission, conditioned, however, upon the completion of the work of construction within a period to be designated by the Commission in its order granting such permission.

mination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments, or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally

ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of

establishing and maintaining a general railroad contingent fund as hereinafter described. For the purpose of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

(7) For the purpose of paying dividends or interest on its stocks, bonds, or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.

III.

THE HISTORY OF THE TIMES UNDER WHICH CONGRESS ACTED.

In *Stafford* v. *Wallace*, 258 U. S. 495, this Court, speaking by Mr. Chief Justice Taft, said (p. 513):

> It was for Congress to decide from its general information and from such special evidence as was brought before it the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted. (*Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; *Danciger* v. *Cooley*, 248 U. S. 319, 322.)

As a means of ascertaining the "history of the times" or "the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted," the reports and debates may properly be resorted to. (*United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 316, 320; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 50. See also *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 463; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238.)

The court will take judicial notice that at the end of December, 1917, the Hindenburg Line was established. The Nation had been in the war nearly a year and its armies were moving to Europe in increasing numbers. The conflict had developed into

a war of transportation as well as a war of arms and the decisive battles were fast approaching.

Transportation facilities on both land and sea were inadequate while their need was paramount. For many reasons not necessary here to set forth, but principally for lack of revenue to provide new equipment and to increase wages, the rail carriers had become unequal to a great national emergency. Congestion prevailed at all terminals. The report was prevalent that a man could walk from New York to Buffalo, or from New York to Philadelphia, or from New York or Philadelphia to Pittsburgh on the tops of loaded freight cars. At Chicago, Minneapolis, St. Louis, and Cincinnati conditions were the same. Rail carriers were confiscating such fuel as appeared on their tracks for use in their locomotives. Many of the great industries were threatened with shutdown for lack of fuel. The progress of shipbuilding was imperiled. Prolonged strikes on the part of the railroad and coal mine employees with the awful consequences were threatened and imminent. Public schools and churches were closed. Whole communities were without fuel and the winter of 1917–18 was the severest in a generation.

Circumstances such as these prevailed when the President issued the proclamation, on December 26, 1917, to take possession and assume control, for the national security and defense, of the entire railway transportation system.

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March 21, 1918, the Federal control act was approved, which became the charter of the President in the control and operation of the carriers. On that very day the Germans opened their vast offensive at the Cambrai Line. Three days later the Germans reached the Somme. A short time thereafter they were again at the very gates of Paris. We were in the war for better or worse, and if the Allies lost, who would pay the bill but the United States. The crisis which then confronted the Nation is still fresh in the minds of all.

General Order No. 27, May 25, 1918, increased the wages of 2,000,000 railroad employees to an amount which approximated $1,000,000,000.

General Order No. 28, May 25, 1918, directed an increase of 25 per cent in all freight rates, both interstate and intrastate, or an amount substantially equal to that of the increase of wages.

The Government found the railroads in a deplorable condition. They had been subjected not merely to double but quadruple regulation by governmental and nongovernmental powers. The Government of the United States since 1887 had tried to regulate them by affirmative legislation. The States continued to regulate them so far as this court in enforcing the Constitution permitted them to do so. The great railroad labor organizations, whose power was for the time being almost omnipotent in the matter of wages, regulated the largest part of their expenditures by compelling them to increase wages, until these wages had been increased far more than

the entire amount of the net revenues of the railroads in the year before the war. The great banking institutions, which were the sources of credit, regulated the railroads by prescribing the conditions upon which they could obtain money to build extensions or operate the railroads.

The fact is that the railroads had been regulated almost to their destruction. The goose that laid the golden egg was well-nigh moribund. The railroads no longer controlled either their income, for rates were fixed by both States and Nation, or their outgo, which was determined very largely by the rates of interest which bankers imposed and by the wages which labor organizations demanded.

The whole system, as an efficient transportation system, had broken down. If transportation is the backbone of the Nation that backbone was broken. Many railroads were in the hands of receivers and many more were headed toward the same graveyard. Everywhere was shortage of cars, equipment, and material.

Shortly before the war, Mr. James J. Hill, the sagacious railroad manager, had estimated that the railroads to be put into first-class condition required $5,000,000,000, and yet with these enormous requirements the sources of credit were dried up.

The Government took over the railroads in this shattered condition and proceeded to expend, as a measure of the war, nearly $1,500,000,000 upon them. At one time, the director general ordered 100,000 cars and 2,000 locomotives. Railroads were

consolidated, terminals were shared in common, equipment standardized, and finally, at infinite cost, the American railroads became almost as important an auxiliary in the world's greatest war as the British fleet itself.

The war had ended, and it was obvious that if the railroads were now returned to their owners without adequate protection many of them would immediately be thrown into bankruptcy and the shrinkage of values on $20,000,000,000 of securities held by private investors would be so immediate and widespread that a panic of colossal proportions would sweep the country. The railroads could not possibly repay to the United States the vast sums which they owed the United States for betterments and withheld revenues, and, on the other hand, the railroads had made vast unliquidated claims against the Government for damages to their roads during the period of governmental operation.

The Transportation Act was passed to meet this difficulty and to avert this crisis. It was passed when the railroads were still under governmental control. If ever there was an emergency this was one, for if the problem could not be solved then there would have been a financial crash which would have done infinite injury to intrastate as well as interstate commerce, and reduced the whole fabric of national prosperity to "ceaseless ruin."

The Committee on Interstate Commerce of the Senate, on November 10, 1919, Senator Cummins (Iowa) Chairman, presented Report No. 304, to

accompany Senate Bill No. 3288, known as the railroad control bill. The report is printed herewith as Appendix A. (Cong. Rec. Vol. 58, Pt. 8, p. 8187.)

Senator Cummins (Iowa), Chairman Committee on Interstate Commerce, on February 19, 1920, presented the report of the Committee on Conference upon House Bill 10453, known as the Railroad Bill, and gave notice that immediately after the House acted upon and reported it, if it was adopted by the House, he would ask consideration on the part of the Senate.

On February 21, 1920, the final vote was taken by the House of Representatives on the Conference Report,[1] resulting in—Yeas, 250; nays, 150; not voting, 27. (Cong. Rec. Vol. 59, Pt. 4, p. 3316.)

On February 23, 1920, the final vote was taken by the Senate on the Conference Report, resulting in—Yeas, 47; nays, 17; not voting, 32. (Cong. Rec. Vol. 59, Pt. 4, p. 3349.)

Senator Cummins (Iowa), February 23, 1920, speaking to the Conference Report, said (Cong. Rec. Vol. 59, Pt. 4, p. 3327, 3328):

> Fourth. That part of the Senate bill known as "section 6" was accepted by the House conferees with two principal modifications. The entire section was rewritten and now appears in the conference report as section 15a of the act to regulate commerce, while its phraseology has been somewhat changed it is essentially the same, with two exceptions, namely, the period in which the 5½ per cent basis is to continue as a direction to the Inter-

[1] Debates and proceedings in the House, see Appendix B, p. 122.

state Commerce Commission has been reduced from five to two years, and the division of excess earnings or income instead of being one-half between 6 and 7 per cent of the value of the property and one-quarter above 7 per cent is now one-half to the company and one-half to the Government throughout.

Inasmuch as this section has been the subject of the grossest misrepresentation on the part of some critics and the most mysterious misunderstanding on the part of many sincere people I deem it my duty to submit a brief comment upon it. In order to prejudice it among the people it has been termed "a guaranty of income." This is not true in any sense of that phrase. There is a guaranty in the bill of the standard return and against deficits, continuing for six months after the railways are returned to their owners, but this was in substance in both bills and apparently has not excited any considerable criticism, for in view of the circumstances its necessity is obvious.

Section 6, now 15a, is, however, not a guaranty, nor does it approach a guaranty even remotely. Not a dollar is to be paid from the Treasury on account of its provisions, and no obligation whatever on the part of the Government is created. It is a direction to an administrative tribunal that in so far as it may be practicable the commission shall make rates that will yield a net operating income of 5½ per cent upon the true value of the railway property held for and used in the service of transportation considered as a

whole. The assumption of this basis by the commission does not promise to any given railway company any given net operating income, for the income depends wholly upon the location of the railway, the population it serves, the volume of its traffic, and the conditions under which it is operated. Under this basis some railways will earn 2 per cent upon the value of their property, some 4 per cent, some 6 per cent, some 8 per cent, a few more than 8 per cent, and a few less than 2 per cent. This basis takes no account of either stocks or bonds but is concerned solely with the value of the property as a whole. It is a basis about $50,000,000 less in the aggregate than the basis of 1917 and about $50,000,000 more than the basis of the test period as defined in the Federal control act. To call it a guaranty is to be either maliciously false or stupidly ignorant. Its value is found in its tendency to give stability to railway credit in the unsettled period through which we are passing. It is a legislative declaration of a rule by which we may assume the commission will be guided in the difficult duties which are to be immediately imposed upon it.

It gives the investing world the assurance that the commission will, during these two years, make an honest effort to adjust rates upon this basis. There are enough uncertainties attending the administration of the law without adding to them an uncertain basis of rate making. For the sole purpose of showing how absurd it is to speak of the rule as a guaranty, I may be permitted to suggest that

in applying it the commission must conjecture or estimate the volume of traffic which the railroads will carry in a future year, and, furthermore, it must conjecture or estimate the cost of maintaining and operating the railways during a time in the future.

If this provision accomplishes its purpose it will not be accomplished because it gives to railway companies undue profit but because it establishes a measure of confidence in the minds of those who have money to invest, which is now, unfortunately, lacking. I take it for granted that the chief desire of the American people is that their commerce may be supplied with adequate facilities for transportation. The country has suffered more in the last year on account of the inability of producers to reach their markets freely and promptly than from any other one cause, and while they want transportation at the lowest practicable cost their overwhelming demand is for transportation itself.

Without entering into the details of the situation, it is well known to every observer that we need from 100,000 to 200,000 additional cars; we need more main tracks, more sidetracks, more warehouses, and more terminal facilities of all kinds. If the railways are to succeed in giving to the people what they must have, if we are to prosper, these companies must borrow or secure in some way not less than $600,000,000 this year and $1,000,000,000 next year. In preparing the section about which I have been speaking I was not thinking so much about the return upon capital

already invested in the railway enterprise as about men who have money to loan or to invest and the conditions upon which they would be likely to make loans or investments in railway properties. It is my deliberate judgment that those Members of Congress who fail to take into consideration this problem in all its aspects and who use their influence either to delay or defeat this bill will in the end deeply disappoint the great body of the people intent upon marketing their products and in developing to the highest point our social and industrial systems.

One word with reference to the much-maligned requirement that a railway company receiving in any year a net operating income of more than 6 per cent upon the value of its property used in the service of transportation shall pay to the Government one-half of the excess.

This regulation is founded upon one of the long-established principles in the regulation of public utilities. It has been in common use from the very beginning of public control. It is neither socialistic nor confiscatory in its character. Some lawyers, looking at the question from the standpoint of their clients, may doubt its constitutionality, but the great majority of the legal profession find no difficulty in defending its validity. If we are to look upon transportation as a national subject and accept it as our duty to sustain railway carriers in all communities which are rendering an indispensable service, we must impose some such limitation. I predict that

this feature of the Senate bill, preserved in the conference report, will meet with almost universal approval and that the immediate future will vindicate its justice and efficiency.

Representative Esch (Wisconsin), February 21, 1920, speaking to the Conference Report of the two Houses, said (Cong. Rec., vol. 59, pt. 4, pp. 3267–3268):

> I have here a statement showing the various expenditures itemized and concentrated, drawn from more elaborate statements made to us by Mr. Sherley. These figures may be of interest, and I read them:
>
> The Government's total expenditures for additions and betterments up to March 1, when Federal control is to end under the proclamation of the President, amount in even numbers to $1,152,000,000. The amount paid out for new equipment—that is, for the 100,000 freight cars and the 1,900 locomotives ordered during the period of Federal control and which were allocated to the several carriers—is $372,000,000. Of this sum $15,000,000 has already been paid in cash by some of these carriers, leaving, therefore, a balance for equipment of $357,000,000 which the Government has expended.
>
> The amount paid for additions and betterments to roadways and equipment for the whole period of Federal control amounted to $70,000,000; but against this sum, under the terms of the bill, offsets are allowed by placing against the indebtedness of the carrier to the Government the Government's indebted-

ness to the carrier resulting from compensation under the Federal control act. There can be offset under the bill against the $780,000,000 for additions and betterments the sum of $461,000,000, leaving, however, as the sum to be funded $319,000,000. This latter sum is to be funded for a period of 10 years, with the option of the carrier to pay any time within the 10 years.

The net excess of operating expenses and compensation to the carriers over the operating revenues for all the roads up to March 1 is $854,000,000. There is due the corporations as compensation for interest and open accounts $1,442,000,000, against which can be applied interest due on Government notes and open accounts and additions and betterments and indebtedness of $709,000,000, making the net sum that must be paid the roads under the terms of the bill $733,000,000.

After set-offs there will be owing the Government on account of additions and betterments $319,000,000; allocated equipment—cars, locomotives, and so forth—$357,000,000; and other indebtedness which will be represented in long-time notes or one-year notes, $239,000,000, a total of $915,000,000. The total amount which the Government must appropriate to make up what may be considered a shortage is $646,000,000. If the $200,000,000 herein appropriated is made, it would still leave $436,000,000 to be appropriated.

The Director General will appear before the Committee on Appropriations early in April, setting forth the facts and circumstances and

> asking for that appropriation. In short, gentlemen, the Government, as a result of our experience under Federal control, will have appropriated approximately $1,900,000,000. Of that sum $1,250,000,000 represents what has already been appropriated, and the additional $200,000,000 herein provided will make $1,450,000,000.

Representative Esch (Wisconsin), February 21, 1920, speaking to the Conference Report, said (Cong. Rec. vol. 59, pt. 4, pp. 3269, 3270):

> But, gentlemen, my time is short. I shall take up what is known as section 6. You will find it in section 422 of the pending bill. It provides for a rate of return on the valuation of the railroad property either taken as a whole or within a given district or territory. This provision was not in the House bill. Against it the House conferees stood for five or six weeks and until the compromise was finally reached. The whole basis for section 6 can be found in these works in the bill, on page 91, paragraph 5:
>
> "(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in ex-

cess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return shall hold such part of the excess, as hereinafter prescribed, as trustee for and shall pay it to the United States."

The large problem that has given difficulty to the Interstate Commerce Commission and to every regulatory body heretofore has been the fixing of rates on competitive traffic which will not allow one road to earn excessive income while another road on the same rate does not get a sufficient income. No formula has under existing law yet been discovered to meet that situation. You can meet it in two ways—by consolidation of all carriers under one system, where there would not be the problem of the weak and the strong, or under the plan suggested in section 422. The valuation of all railroad property used in the service of transportation in a given district or territory or in the country as a whole is to be made by the commission. The commission then prescribes such level of rates as will produce, as near as may be, a 5½ per cent return on such valuation. In this House I have strongly contended that we should adhere to the existing standard for rate making—that is, that rates should be just and reasonable—but longer consideration has driven me to the opinion that capital will not invest in railroad securities on merely a declaration that the commission shall fix just and reasonable rates.

Investors want something definite and fixed upon which they can reckon. The provisions of section 422 give that stability, that standard which, I trust, will encourage investment; but it is objected that we are making a standard based on the rate of return on the value of the property. What is the value of the property? For the present I acknowledge we have not yet available the physical valuation as prescribed by the act of 1913, but much information is already available to the commission secured under this act. Under section 422 the commission, in determining the aggregate value, shall give to the property investment account only such consideration as is allowed under the law of the land. We do not make capitalization—please mark this—we do not make capitalization the basis of valuation. It may amount to something, or it may amount to nothing. It is only one of the elements which the commission prior to the completion of the valuation work shall consider as laid down by the Supreme Court of the United States in the leading case of Smythe against Ames, One hundred and sixty-ninth United States Reports, opinion by Harlan, justice. What the valuation made by the commission will be I can not state. It will not be property investment account or the book cost, now estimated to be about $19,000,000,000, for everybody knows that book cost or property investment account exceeds the capitalization. Prior to 1907, when the uniform system of accounting was prescribed, these property investment accounts were no doubt padded, but since that time every dollar invested in railroad prop-

erty is accounted for and can be found in the records of the Interstate Commerce Commission. It may be said, therefore, that neither the property investment account nor the capitalization will be the permanent standard of valuation. But the standard will be such as the commission will fix in the light of the information it already has and will secure as the result of the physical valuation act of 1913.

It is stated in the press and elsewhere that the railroads of the country are not worth more than, say, $12,000,000,000, based on the tentative valuation of three or four small roads, such as the Kansas City & Southwestern, the Texas Midland, and a Georgia road—as these valuations amount to only 50 per cent of the book cost or property investment account, all the railroads of the United States are worth practically only 50 or 60 per cent of their book cost or property investment account. When the valuation of the great trunk lines, the lines that do 90 per cent of the country's business, is completed I am confident we shall find that their valuation in many cases will equal and, in some, exceed the capitalization. The Burlington & Quincy has a low capitalization; the Pennsylvania has a low capitalization. The Pennsylvania in the last 20 years has invested $400,000,000, taken from its earnings without adding this vast sum to its capitalization. It spent this sum for betterments and improvements, thereby increasing the facilities of transportation and adding to the comfort and convenience of the people.

The valuation having been made, it does not mean that the Government guarantees to every carrier a 5½ per cent return upon its valuation. I know that there are some papers and some individuals who believe that section 422 constitutes a guaranty and that every road is to get a 5½ per cent return on the valuation of its property.

Nothing of the kind. There is no guaranty here in the respect that the Government must make good the difference between 5½ per cent and what the road actually does earn out of its business. There is no such guaranty. The Government does not make good a dollar. On the contrary, the Government takes one-half the excess over the fixed return and puts it into a Government fund for use in transportation. Under this section some roads may earn 2 per cent, some 3, some 4, and some 5 per cent. It will depend upon each road as to whether or not it will earn 5½ per cent. It is up to the roads, through efficiency, economy, and wise management, to increase their earnings, and if they get up to 5½ per cent or 6 per cent, in the discretion of the commission, one-half per cent being allowed for additions and betterments, not included in capital account, they keep every dollar of it. When they get beyond that there must be a division. The division is a 50-50 proposition, beyond the point where this minimum return stops.

I know there are men in this House, as there are elsewhere, who have great doubts as to the constitutionality of the power of Congress to take this surplus and devote it to other uses

than to the uses of the agency which develops the surplus. There are eminent counsel on both sides of this proposition. Ex-Justice Hughes, Mr. Thom, and Judge Lovett claim that this is an unconstitutional exercise of power. We have as eminent counsel on the other side who say they have no doubt but that it is a constitutional exercise of power. Elihu Root, John S. Miller, and John R. Milburn are of that opinion.[2]

I am persuaded after further study, although in no way claiming to be an authority, that we have this power. Its constitutionality is further indorsed by the three men who in my opinion can speak with largest authority on the subject. These three men are Commissioner Clark of the Interstate Commerce Commission, the senior man in service on that commission, a man of great ability and large experience under the interstate commerce act. In his opinion Congress has this power; that is no more a violation of the Constitution than it is for Congress to take excess-profits taxes and put them into the Treasury of the United States and then loan them out through the farm loan act. He contends that this plan is the only way in which we can meet the problem of so fixing the rates between competitive points that they will not produce an excessive return to one carrier and less than a reasonable return to another. He stands for this proposition and for a division of the excess.

[2] Vol. 3, Hearings before Committee Interstate and Foreign Commerce, 66 Cong., 1st sess., pp. 2981–2986. Same, 3002–3009.

Who else supports this proposition? Judge Prouty, for many years the chairman of the Interstate Commerce Commission, one of the ablest chairmen that that commission has ever had, he, too, is in accord with this plan. And, lastly, Director General Hines supports this plan. These three men do not have any qualms as to the constitutionality of an act of Congress giving one-half the excess to the Government.

What is the Government going to do with its half? Does it take money from one railroad and give it to another, as is so generally contended? It does not. The excess that goes to the Government goes to the Interstate Commerce Commission and constitutes a fund out of which the commission can loan money to the needy carrier at 6 per cent interest, or out of which it can purchase equipment for leasing the same to the carriers at a rental which will represent 6 per cent on the value of the equipment plus a depreciation charge.

The Government is losing nothing. This is not a guaranty. The Government will secure a large sum of money in peace times when things again become normal. I do not expect the Government to get much of a fund in the very near future, but in time this plan will develop a considerable fund to be used for the purposes I have enumerated. So the Government is not losing anything. The Government is gaining something, and commerce and transportation will be vastly stimulated by reason of it. We do not destroy the initiative of the carriers. I know that argument is

made many times. Why, they get a half over the 6 per cent or the 5½ per cent, and that is a stimulus for the roads to use more efficiency more initiative, more wise management, because the more the road earns above the minimum the larger the company's share will be.

We require that these excess earnings on the part of the carrier shall be utilized to develop a reserve fund that shall in time grow to be 5 per cent of the valuation of the road; and after this reserve fund has been accumulated the carrier can use the money as it deems best.

Representative Fess (Ohio), February 21, 1920, speaking to the conference report, said (Cong. Rec. Vol. 59, Pt. 9, p. 8817):

Immediately the railway bill was taken up and the hearings opened on July 15. They continued every day, forenoon and afternoon, until September 24. An additional day was given October 4. These hearings were published in three large volumes of 3,669 pages. They constitute the finest body of the most important expert information on a great subject ever collected by any committee in the history of the Congress of the United States. The finest talent in America presented their facts and conclusions on the proposed legislation. This body of information represents every angle of transportation. No interest that made application to the committee was denied a hearing. Individual proposals were presented to the committee as bases of legislation. Weeks were consumed on hearing

these arguments. These proposals touched many single and specific features of the problem, any one of which, if considered as a single proposal, would occupy the attention of Congress for weeks in final consideration. There were between 30 and 40 such individual proposals offered to the committee. All of these were given such consideration as their importance demanded. Besides these there were seven matured plans presented and urged by as many associations or interests, in which groups of interests were presented. Among these were the Plumb plan, speaking for labor; the Warfield plan, speaking for security holders; the executives' plan, speaking for the owners; the Interstate Commerce Commission plan, speaking for the Government; and others. Those plans, each one of them, from specific angles presented strong arguments for adoption. In the nature of the case neither could be adopted, and considered individually they were more or less antagonistic to one another. It was the committee's problem to draft such a measure as to include the strong points of each and omit the questionable items of each, recognizing the importance of all the interests involved, but never losing sight of the larger factor—the public. The committee proceeded on the principle that if the public was served no justifiable interest could be greatly injured.

The Committee began the drafting of the measure with these points in view and reported it for committee consideration November 8. It passed the House nine days later,

on November 17, after one of the most able debates ever heard on any measure. The Senate passed the Cummins bill a month later, December 19. The two measures went to conference three days later. They were considered in conference every day, including Sundays and throughout the holiday season, without vacation until February 19. Considering the sharp differences between the two Houses the time was not too long. Among the many items of difference between the bills were those of credit and labor. These two were the most difficult because so vastly important. After weeks of effort to reach an agreement the conferees have reported a plan of agreement on both items which should be satisfactory to both interests, since it serves the public, which includes both the employer and employee. It duly respects the importance of credit and provides for it. It also duly respects labor and seeks to protect it.

Representative Steele (Pennsylvania), February 21, 1920, speaking to the Conference Report, said (Cong. Rec. Vol. 59, Pt. 9, p. 8818):

In section 422 of the bill a new section, to be known as section 15–A to the interstate commerce act, sets forth the necessity for the new basis of rate making, as follows:

"(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such

traffic, and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property, held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return shall hold such part of the excess as hereinafter prescribed as trustee for and shall pay it to the United States."

The payment to the United States, however, is in trust for the transportation purposes above mentioned.

The power of Congress to direct such use of excess earnings thus produced is challenged on the ground that if the rates charged by the carrier are just and reasonable they are the private property of the carrier, and if unreasonable it would deprive shippers and passengers of their property without due process of law. Is it, then, within the power of Congress to divide the railways into rate-making districts and establish rates on a group basis, directing that any excess earnings beyond a reasonable return be used to sustain transportation in the group as a whole and impress such excess earnings with a trust as set forth in the section above quoted? The question whether a law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized but upon its practical operation and effect. Congress being empowered to regulate commerce

among the several States and to pass all laws necessary and proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for the same.

Within the scope of the word "regulation," as used in the commerce clause, is embraced the idea of fixing the compensation which the owners of railroad property shall receive for the use thereof. Generally speaking, what the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. It is manifestly a question for Congress to determine whether or not the regulations adopted are the best to promote the public interest. All that the courts have to consider in passing upon its constitutionality is as to whether it is calculated in any appreciable degree to advance the constitutional end involved. It is a settled principle of constitutional law that the Government which has a right to do an act and has imposed upon it the duty of performing that act must, according to the dictates of reason, be allowed to select the means, and those who contend that it may not select any appropriate means, that any particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception. In the present instance this burden has been met by the mere characterization of the rate-making basis selected by Congress as a

violation of the right of private property without the citation of any specific judicial authority to sustain the charge.

The control of interstate commerce having been granted to the Federal Government without limitation, the grant is, according to the general principle governing the interpretation of grants of Federal power, construed to be plenary. Such control is not confined to the instrumentalities of commerce or the Postal Service known or in use when the Constitution was adopted, but keeps pace with the progress of the country and adapts itself to the new developments of time and circumstance as the new agencies are successively brought into use to meet the demands of increasing population and wealth. And with reference to the fifth amendment, which forbids the taking of private property for public use without just compensation or due process of law, the Supreme Court has said:

"That provision has always been understood as referring only to direct appropriation and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses, may indeed render valuable property almost valueless. They may destroy the work of contracts."

It may be added that if this principle be not sound the result would be that individuals and corporations could by contracts between

themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. No power of Congress can be thus restricted.

In the section quoted, Congress declares that in order to maintain lines of transportation for the convenience of the public it is necessary to establish rates that will produce a fair return on the aggregate value of the railroad property in the rate-making district. The public surely has an interest in the maintenance of these transportation facilities. It is a deliberate enactment declared to be necessary to meet conditions which actually exist. There is no express prohibition upon the right of regulation by Congress to establish rates with reference to aggregate or average conditions. Congress declares it to be impracticable to estimate the cost or value of each railway service. If the practicable method adopted by Congress produces an excess as to particular lines but necessary to maintain all the lines in a rate group, is that beyond its constitutional powers? Clearly this excess is still devoted to a public purpose and within the power of Congress. It does not interfere with past earnings but simply regulates future earnings and impresses these earnings with a public trust. As supervisory trustee of the public rights, under its express power of regulation, the Government asserts its power so as to give to all the people of a rate-making district the assured maintenance of their transportation lines. It is established

by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use, and also that the share of each party in the benefit of a scheme of mutual protection is a sufficient compensation for the correlative burden he is compelled to assume.

These principles have been applied to private property whenever in any way affected with a public interest, and apply with greater force to railroad corporations because they are engaged in a public employment. The provisions of the bill I have discussed are, in my judgment, a reasonable exercise of the power of regulation vested in Congress to promote the interests of interstate commerce.

On February 28, 1920, at midnight, the carriers were relinquished from Federal control and the Transportation Act became effective. Immediately the Interstate Commerce Commission commenced hearings on applications by the carriers under and in pursuance of the Transportation Act for increases in freight and passenger rates. In *Ex parte 74*, Increased Rates, 1920, 58 I. C. C. 220, on July 29, 1920, the Commission authorized general freight rate increases: Eastern Group, 40 per cent; Southern Group, 25 per cent; Western Group, 35 per cent; Mountain-Pacific Group, 25 per cent; all passenger fares, rates on excess baggage, and rates on milk and cream, 20 per cent; and a surcharge of 50 per cent of the charge for space in sleeping and parlor cars.

In *Wisconsin Commission* v. *C., B. & Q. R. R.*, 257 U. S. 563, 585, 589, this Court said:

> The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in §15a to be one of the purposes of the bill. * * * Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory rate for all the work it does.

IV.

THE BRIEFS OF OPPOSING COUNSEL.

Counsel for appellant have filed an elaborate brief directed to the situation of the Dayton-Goose Creek Railway, a standard guage short line, operating between Dayton, Liberty County, Texas, to Goose Creek and Baytown, Harris County, Texas, a distance of about 25 miles. It has a trackage right over the line of the Trinity Valley & Northern from Dayton to a point northeast thereto at a connection with the line of Beaumont, Sour Lake & Western. It exchanges traffic with the Southern Pacific System and the Gulf Coast Lines. (Tr. 3.)

The brief argues that the "recapture clause" violates the Fifth and Tenth Amendments; that it does not assess or levy a tax, and that the record does not show a valuation upon which the quantum of the

so-called excess earnings may be recaptured. (Br. 24.) The learned counsel have adopted the expressions "recapture clause" and "excess earnings" and used them throughout the brief.

As *amici curiæ*, nineteen counsel representing as many trunk lines have filed a joint brief. With respect to section 422, they say (Br. 7):

> Paragraphs (2), (3), and (4) of Section 15a undoubtedly constitute a regulation of commerce. We do not question that their object—the promotion of the commerce of the whole country through the rehabilitation of the credit of the carriers and the necessary enlargment of transportation facilities—was within the granted power to regulate interstate commerce. We do not question that these provisions were appropriate and legitimate means to accomplish that object, subject to the qualification that the percentage constituting a fair return could not be conclusively fixed by Congress or the Commission. (*Chicago, Milwaukee & St. Paul Ry. Co.* v. *Tompkins*, 176 U. S. 167, 173; *Lincoln Gas Co.* v. *Lincoln*, 250 U. S. 256, 267; *Bluefield Water Works and Improvement Co.* v. *Public Service Commission*, decided by this court June 11, 1923.)
>
> Our challenge is directed to the subsequent provisions of section 15a, those embodied in paragraphs (5) and (6) *et seq.* of that section.

Thus, these nineteen trunk lines and their counsel readily embrace those paragraphs which are accepted as favorable to them. In almost the same sentence they reject correlative and interlocked paragraphs which place a limitation on what they so readily and

gladly accepted. Their argument is that any law which provides the money which the public must pay to maintain an adequate transportation system, is a valid regulation of interstate commerce; but that any limit fixed beyond which Congress will not go is unconstitutional even though the return amounts to 100 per cent. *Amici curiae* should not be allowed to stand for the validity of and claim the benefits under an act constructed as the Transportation Act and in the same breath "assert the unconstitutionality of its limitations." (*Grand Rapids & Indiana Railway* v. *Osborn*, 193 U. S. 17; *Daniels* v. *Tearney*, 102 U. S. 415; *Baltimore & Ohio* v. *Lambert Run Coal Co.*, 267 Fed. Rep. 776.)

The appearance of the nineteen trunk lines representing approximately 69,000 miles of railroad,[3] or

[3] Poor's Manual of Railroads, 1923, reports the mileage operated by each carrier listed in the brief filed by the counsel for the Trunk Lines, thus:

	Miles.
Southern Pacific	14,101.74
Lehigh Valley	3,511.28
Western Pacific (and D. & R. G.)	3,647.41
New York Central	17,195.10
Union Pacific	9,449.96
Chesapeake & Ohio	2,555.70
Western Maryland	804.44
Illinois Central	4,784.64
Delaware, Lackawanna & Western	953.84
Virginian Railway	540.53
Duluth, Missabe & Northern	335.90
Chicago & Eastern Illinois	945.13
Kansas City Southern	843.10
El Paso & Southwestern	1,139.90
St. Louis Southwestern	1,775.98
Wabash Railway	2,472.96
Pere Marquette	2,212.96
New York, Chicago & St. Louis	523.22
New Orleans, Texas & Mexico	1,015.19
Total	68,808.98

one-fourth of the total, no longer makes the case one between the Dayton-Goose Creek Railway and the Government; it is now a case in which practically the entire system of railway transportation has representation.

The numerous counsel for the nineteen trunk lines reject the designations "recapture clause" and "excess earnings." They characterize paragraphs (5) and (6) as the "income-appropriation" provisions (Br. 8), and repeat the words in at least 77 instances, sometimes as frequently as five times on a single page.

> Pause, or be more temperate.
> It ill beseems this presence, to cry aim
> To these ill-tuned repetitions.

The learned district court more accurately gauged the Congressional intent and its language is appropriate, viz (287 Fed. Rep. 732, 733, 734):

> Indeed, this part of the income of the road is not collected by it absolutely as its property. It is earned and collected under the terms of the Transportation Act to be held in trust for, and to be paid to, the United States.
>
> * * * * *
>
> It is to be presumed that the rates permitted to be charged by the railroads under this Act are not unjust and unreasonable as to the shippers, where authorized by the Commission which is vested with such extensive powers as to seeing that such rates are just and reasonable and nondiscriminatory as to the shippers.
>
> It may be also questioned whether the carrier could be charged, in any event, with

the percentage which had been paid therefrom to the United States under the terms of this Act.

But if the sums paid to the Government are to be regarded as overcharges paid by shippers and as money to which they are entitled, this does not give to the carrier any right to retain this sum, or to an injunction to restrain the Government from collecting the sum which the carrier is only allowed to collect as a trustee for the United States, or for special purposes prescribed by statute.

The Transportation Act provides that this fifty per cent of the excess over 6 per cent is not collected, or held, by the carrier for its own account, but as trustee for the United States, to whom it is to be paid.

Clearly, the carrier is not entitled to retain it in the absence of any demand on it for its repayment by the persons from whom collected.

* * * * *

It is not perceived what right the complainant has, in this situation, to decline to recognize its liability to the United States and make payment to the Interstate Commerce Commission, as its designated agent.

Thus, the repetitions of opposing counsel of the words "income-appropriation" are made in the face of the explanatory statements of members of the committees and the very carefully prepared opinion of the District Court, all to the effect that the excess is never collected by the carrier as its absolute property but under the statute it is a mere trustee of the same.

As *amicus curiae*, counsel for the Kansas City Southern Railway, who also appears on the brief of the nineteen, has filed a separate brief, in which he plunges into the Valuation Act, and contends that for the purpose of the recapture clause, that act requires the ascertainment of economic value, and that the economic value of railroad property bears a relation to the income which it affords. (Br. 3.) The brief is wide of the mark and deals with another section of the statute entirely (section 19a) which is not in controversy in this proceeding. The omission of such argument from the brief of the nineteen (in which the Kansas City Southern is included) would indicate that the other eighteen were also of opinion that the Valuation Act was not in controversy.

As *amici curiae*, three counsel for Wabash Railway, Western Maryland Railway, and St. Louis Southwestern Railway (two of whom also appear on the brief of the nineteen) have also filed a separate brief, and argue that the "income-appropriation" provisions are unconstitutional on their face because Congress legislated upon the assumption that a rate of six per cent upon the aggregate value of the carrier's railway property constitutes a fair return and that any income in excess of six per cent lies outside of the protection of the Fifth Amendment (Br. 3), thus (Br. 4):

> It is our contention that six per cent is not a fair return upon railway property *in any part of the country*, but if we are wrong as to

> this, and it is believed that six per cent is a fair return upon railway property in some parts of the country, then we submit that Section 15a is unconstitutional and void because it attempts to fix six per cent as a proper rate of return on railway property in every part of the country. (Italics ours.)

The principal authority cited in support of the proposition is *Bluefield Water Works & Improvement Company* v. *Public Service Commission*, decided June 11, 1923. In that case, according to the language of the brief, the Supreme Court did not overrule the principles laid down in *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 48–50 (1909), in which it was held that *under the circumstances of that case* 6 per cent was a fair return on the value of the property employed in supplying gas to the City of New York and that a rate yielding that return was not confiscatory; or the principles laid down in *Cedar Rapids Gaslight Co.* v. *Cedar Rapids*, 223 U. S. 655, 670 (1912), which declined to reverse the State Court where the value of the plant considerably exceeded its cost and the *estimated* return was over 6 per cent; or the principles laid down in *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 172 (1915), which declined to reverse the United States District Court in refusing an injunction upon the conclusion reached that a return of 6 per cent per annum upon the value would not be confiscatory.

This Court held in the *Bluefield Water Works Case* that "*under the facts and circumstances indicated by*

the record, we think that a rate of return of 6 per cent upon the value of the property is substantially too low to constitute just compensation for the use of the property employed to render the service." The Public Service Commission had failed to give proper weight to the "higher cost of construction" and to the "cost of reproduction less depreciation." This Court said: "The valuation can not be sustained." There is certainly no evidence in the record in the instant case (which involves the railway transportation system of the continental United States) which would indicate that there is any similarity between it and the facts and circumstances on which this Court reversed the decree in the *Bluefield Water Works Case*. On the contrary, the two cases are obviously so widely different as to dispense with comparison. Moreover, with respect to the six per cent return counsel for the nineteen trunk lines say (Br. 7), "Paragraphs (2), (3), and (4) of section 15a *undoubtedly* constitute a regulation of commerce."

In *Yale Law Journal, January, 1923*, in a very carefully prepared article entitled "Recapture of Earnings Provision of the Transportation Act." Mr, Charles W. Bunn,[4] whose high standing and long experience at the Bar are as well known as that of any

[4] Mr. Charles W. Bunn, St. Paul, Minnesota, has been General Counsel of the Northern Pacific Railroad Company for more than 26 years. He was counsel for the railroad companies in *Northern Securities Case*, 193 U. S. 197, 273; *Minnesota Rate Cases*, 230 U. S. 352, 364; *Ex parte Young*, 209 U. S. 123, 139. His article is referred to not only as an argument in favor of the validity of the recapture clause but as the opinion of an official who shares the responsibility of maintaining in accordance with the law of the land an adequate transportation system for the United States.

lawyer, soundly argues that the recapture clause is in all respects a valid exercise of Congressional power. He says (Y. L. J., Jan., 1923, p. 222):

> On this principle legislation has been common which classifies or distinguishes between railroads and fixes a less charge for those on which traffic is dense or most profitable. Such classification was held reasonable in *Chicago, Burlington & Quincy Ry.* v. *Iowa*, 94 U. S. 155. And in *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U. S. 339, the court sustained a Michigan statute which fixed passenger fares differently on different roads according to gross earnings per mile.
>
> If a carrier's rates may be made with reference to its prosperity lower than those of other carriers, and if no carrier can insist as an absolute legal right on receiving more than a fair return on the value of its property, it would seem that there can be no violation of the Constitution in the mere recapture of so-called earnings made after the act was on the statute books, provided that after the recapture the carrier is left with a reasonable return on the value of its property. The rates fixed as provided in the act are tentative only; and if any carrier's earnings are afterwards recaptured and its property and revenue left exactly where they would have been had rates been fixed originally to yield the same amount, it can make no difference to the carrier whether this result is reached by rates directly fixed for it or by higher rates fixed tentatively for a group, subject to readjustment through recapture.

> Under the law as it stood before the act, if rates were fixed applicable to six competing roads which would give to road A, the most favorably situated of the six, a reasonable return on the value of its property and yield the other five roads less, it was settled that road A could not successfully object to the rates. Its constitutional right was held confined to an objection to such rates only as deprived it of a reasonable return on the fair value of its property. This precise question was determined in the *Minnesota Rate Cases*, 230 U. S. 352.

As *amicus curiæ* counsel for the National Association of Owners of Railroad Securities has filed a brief in support of the validity of the Act. There appears to be division of opinion not only among the companies themselves but between the owners of the securities and the companies as well.

Counsel for the owners of the railroad securities in brief and the counsel for certain trunk lines companies in published articles in leading journals all stand on the side of the Government. Counsel who appear against the Government are numerous and so divided, even though they represent like interests, that they file separate briefs. Lack of unanimity on the part of those so gravely affected goes far to sustain the law. The diversity of their arguments bewrayeth them.

V.

THE DECISIONS OF THIS COURT SUSTAINING THE BROAD PROVISIONS OF THE TRANSPORTATION ACT.

In enacting the Transportation Act the Congress was avowedly considering the transportation system throughout the continental United States as a whole. To hold that the Congress enacted the broad provisions to raise revenue, to prescribe divisions, to provide for settlement of disputes between carriers and their employees, and for other equally important purposes, in order to maintain an adequate transportation system, and then to annul and strike down the standard or basis for which these enormous increased revenues are to be raised and equitably distributed or placed, would defeat the whole intention of the Congress and bring about a situation more destructive to the public interest than if no part of the Act had ever been passed.

Never in its history has Congress enacted a statute in which the sections were so closely interlocked and dependent each upon the other. The Congress was considering "the transportation needs of the country." If paragraphs (5) and (6) of section 422 are torn from the body of the Act, the whole foundation of the entire legislative scheme fails.

In cases thus far decided both the District Courts and this Court, in approaching the subject, have persistently exercised the judicial power with a scope coextensive with the congressional enactment, and have kept the entire Act and all of the carriers

subject thereto in full view at all times, to the end that all of the incidents to the development of an adequate transportation system may move forward at once and together.

With an understanding and a frankness which prevails throughout the whole of their brief, learned counsel for appellant, in referring to the recitals contained in paragraph (5), aptly state that they "are in the nature of a preamble which this Court has well denominated as 'a key to open the understanding of a statute.'" Citing *Coosaw Mining Company* v. *South Carolina*, 144 U. S. 550 (Br. 130). Such a statute is not to be interpreted and executed along restricted and narrow lines when dealing with such a complex and stupendous subject. In *Reduced Rates, 1922*, 68 I. C. C. 676, 733, the Commission said:

> In 1921, freight traffic was only slightly more than 10 per cent in excess of that in the year ended June 30, 1915, which was not an unusual year. But the charges for moving freight traffic in 1921 totaled nearly four billion dollars, or about two billion dollars in excess of 1915. Railway operating revenues in 1921 aggregated about 5½ billion dollars, or more than 2½ billion dollars in excess of 1915. If the traffic in 1921 had equaled that indicated as normal by the trend during the 26-year period preceding the war, freight revenues and total railway operating revenues would have exceeded those of 1915 by approximately 2½ billion and 3½ billion dollars, respectively.

In *Wisconsin Railroad Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 565, in the statement of the case, Mr. Chief Justice Taft said:

> The Commission had investigated the interstate rates of carriers in the United States, in a proceeding known as *Ex parte 74, Increased Rates*, 58 I. C. C. 220, for the purpose of complying with § 15a of the Interstate Commerce Act as amended by § 422 of the Transportation Act of 1920 (41 Stat. 488). That section requires that the Commission so adjust rates that the revenues of the carriers shall enable them as a whole or by groups to earn a fixed net income on their railway property.

In the *Wisconsin case* paragraphs (3) and (4) of section 13 of section 416 and section 15a of section 422 were assailed as unconstitutional by forty-five states. Rejecting the arguments *in toto*, and sustaining the validity of the act in all respects, this Court, speaking further through the Chief Justice, said (p. 584, 585):

> Under Title IV, amendments were made to the Interstate Commerce Act which included § 13, paragraphs 3 and 4, and § 15a, already quoted in the margin. The former for the first time authorizes the Commission to deal directly with intrastate rates where they are unduly discriminating against interstate commerce—a power already indirectly exercised as to persons and localities, with approval of this court in the *Shreveport* and other cases. The latter, the most novel and most important feature of the act, requires the Commission so to prescribe

rates as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation for two years; the return is to be 5½ per cent and ½ per cent for improvements, and thereafter is to be fixed by the Commission.

The act sought to avoid excessive incomes accruing, under the operation of § 15a, to the carrier better circumstanced, by using the excess for loans to the others and for other purposes. The act further put under the control of the Interstate Commerce Commission, 1st, the issuing of future railroad securities by the interstate carriers; 2d, the regulation of their car supply and distribution and the joint use of terminals; and, 3d, their construction of new lines and their abandonment of old lines. The validity of some of these provisions has been questioned. Upon that we express no opinion. We only refer to them to show the scope of the congressional purpose of the act.

It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate

> compensation for the particular service rendered and the abolition of rebates. *The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in § 15a to be one of the purposes of the bill.* (Italics ours.)

In *Pennsylvania Railroad* v. *Railroad Labor Board*, 261 U. S. 72, Title III of the Transportation Act (41 Stat. 456, 469) and the action of the Labor Board thereunder were assailed. The United States Circuit Court of Appeals at Chicago quickly threw the weight of the judicial power back of the statute. This Court, in affirming the decree of the Court of Appeals, and again speaking through Mr. Chief Justice Taft, said (p. 79):

> It is evident from a review of Title III of the Transportation Act of 1920 that Congress deems it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes. * * * The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding. * * * The purpose of Congress to promote harmonious relations between the managers of

> railways and their employees is seen in every section of this act, and the importance attached by Congress to conferences between them for this purpose is equally obvious (p. 83).

Section 301 of Title III makes it the duty of the carriers, their officers, employees and subordinate officials, to exert every reasonable effort to avoid interruption to the operation of interstate commerce due to a dispute between the carriers and their employees. There again is a recital in the nature of a preamble which operated as the "key to open the understanding of a statute."

In *New England Divisions Case*, 261 U. S. 184, the opinion was announced on the same day as that in the *Labor Board Case*. Seeking to escape from the far-reaching sanctions with which this Court defended the whole Act like a protecting shield, the counsel for the nineteen trunk lines state (Br. 51), that the language of this Court, in referring to the group system of rate making, "Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues," was an inadvertence due to the fact that the provisions of 15a were not litigated in that case and so were not the subject of careful analysis. This assumes that this Court in its weighty opinion in that great case did not weigh its language with precision.

The proceedings before the Interstate Commerce Commission and in the District Court, the arguments in the briefs of counsel and at the bar, and the opinion

of this Court all show that section 15a, practically in its entirety, was involved in the hearings in the *New England Divisions Case*. What this Court said concerning the so-called "recapture clause" and other paragraphs of that section was not inadvertence but squarely within the issues made by the parties. Practically the same arguments now advanced by appellant and the numerous *amici curiæ* went over the dam and beyond rescue in the *New England Divisions Case*. To sustain their contentions or any substantial part of them in the instant case would be to overrule the opinion in the *New England Divisions Case*. It is also noteworthy that the Delaware, Lackawanna & Western, The Chesapeake & Ohio, The Illinois Central, The Lehigh Valley, The Kansas City Southern, The New York, Chicago & St. Louis, The Pere Marquette, and The Wabash companies were all complainants in the *New England Divisions Case* in the unsuccessful attempts in two courts to overthrow the order of the Commission in that case.

In the *New England Divisions Case* this Court, as did the District Court, considered the transportation system as a whole. Mr. Justice Brandeis said (261 U. S. 189):

> Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore the effort of Congress had been directed mainly to the prevention

of abuses, particularly those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission new powers were conferred and new duties were imposed.

The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities but for adequate maintenance. On some, continued operation would be impossible unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear. A five per cent increase had been granted in 1914, *Five Per Cent Case*, 31 I. C. C. 351; 32 I. C. C. 325; fifteen per cent in 1917, *Fifteen Per Cent Case*, 45 I. C. C. 303; twenty-five per cent in 1918, General Order of Director General, No. 28. Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous com-

petitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshalling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable.

Raising joint rates for the benefit of the weak carriers might be the only feasible method of obtaining currently the needed revenues. Local rates might already be so high that a further increase would kill the local traffic. The through joint rates might be so low that they could be raised without proving burdensome. On the other hand, the revenues of

> connecting carriers might be ample, so that any increase of their earnings from joint rates would be unjustifiable. Where the through traffic would, under those circumstances, bear an increase of the joint rates, it might be proper to raise them and give to the weak line the whole of the resulting increase in revenue. That, to some extent, may have been the situation in New England, when, in 1920, the Commission was confronted with the duty, under the new section 15a, of raising rates so as to yield a return of substantially 6 per cent on the value of the property used in the transportation service. *Ex parte 74, Increased Rates, 1920*, 58 I. C. C. 220.

The language of this Court with respect to "weak lines," their "prosperous competitors," the "widely varying earning power of the several lines" and "their varying needs," the "recapture from prosperous competitors of surplus revenues," how "the weak were to be helped by preventing needed revenue from passing to prosperous connections," and thus "by marshalling the revenues," it was planned "to distribute augmented earnings" which "would enable the whole transportation system to be maintained" is all highly appropriate here.

Moreover, as the provision concerning divisions was "an *integral part of the machinery* for distributing the funds expected to be raised by the new rate-fixing sections" and was indispensable to that end, so is the provision concerning the recapture of excess earnings an *integral part* of such machinery and like-

wise indispensable. In sustaining the provision concerning divisions as an integral part of such machinery this court took notice of "the situation in New England, when, in 1920, the Commission was confronted with the duty, under the new section 15a, of raising rates so as to yield a rate of substantially 6 per cent of the value of the property used in the transportation service. *Ex parte 74, Increased Rates, 1920,* 58 I. C. C. 220."

What was said in the opinion of the court respecting the scope of the Transportation Act and the various sections thereof was made after full discussion of all of those subjects at the Bar and after most careful consideration by this court. It is submitted that the opinion is just as conclusive of the validity of the recapture paragraphs as if those paragraphs had been the immediate subject of the controversy instead of the so-called divisions paragraphs. If the court thinks otherwise, then it is submitted that the reasoning in the *New England Divisions Case* is so highly persuasive as to be controlling.

In the *New England Divisions Case* the Commission considered the respective needs of the several carriers in the distribution of the revenue after it was acquired by the carriers and before the net railway operating income reached 6 per cent of the value of the railway property held for and used by each carrier in the service of transportation. In the instant case the net has exceeded the 6 per cent. The constitutional rights of the complainant under the Transportation Act have thus been fully

satisfied. The whole controversy is over the overflow. Thus, the questions disposed of in the *New England Divisions Case* reached heights far beyond anything now claimed by the appellant and the *amici curiae* under the recapture clause. If the Congress may authorize the Commission to direct the distribution among the weaker lines of much needed earnings to maintain an adequate transportation system, *a fortiori*, it may direct the recapture of excess earnings of those who have waxed fat under the Transportation Act. Swollen earnings derived from necessarily general rates for transportation which the public must pay are not guaranteed by the Constitution.

VI.

PARAGRAPHS (5) AND (6) MAY NOT BE SEGREGATED FROM THE PARAGRAPHS WHICH HAVE ALREADY BEEN UPHELD.

In both Houses of Congress the opposition debates waged over section 422, and hammered the so-called guaranty and recapture provisions. The most strenuous opposition was interposed to the former. The records of the Congress will bear the construction that without the recapture provision section 422 would have failed utterly. But reference to the records of Congress is unnecessary. To argue that paragraphs (5) and (6) may now be segregated and adjudged unconstitutional and the so-called guaranty paragraphs allowed to stand is contrary to the whole theory of the Act.

Section 502 provides (41 Stat. 499):

> That if any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid such judgment shall not affect, impair, or invalidate the remainder of the act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment has been rendered.

In *Hill* v. *Wallace*, 259 U. S. 44, 70, this Court, in holding the Future Trading Act, approved August 24, 1921, c. 86, 42 Stat. 187, unconstitutional in practically its entirety, and speaking through Mr. Chief Justice Taft, said:

> Section 11 of this act directs that "if any provision of this act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby."
>
> Section 4 with its penalty to secure compliance with these regulations of Boards of Trade is so interwoven with those regulations that they can not be separated. None of them can stand. Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court. In *United States* v. *Reese*, 92 U. S. 214,

presenting a similar question as to a criminal statute, Chief Justice Waite said (p. 221):

"We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. * * * To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." *Trade-Mark Cases*, 100 U. S. 82; *Butts* v. *Merchants & Miners Transportation Co.*, 230 U. S. 126.

To be sure, in the cases cited there was no saving provision like § 11, and undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But it does not give the court power to amend the act.

There are sections of the act to which, under § 11, the reasons for our conclusion as

to § 4 and the interwoven regulations do not apply. Such is § 9, authorizing investigations by the Secretary of Agriculture and his publication of results. Section 3 too would not seem to be affected by our conclusion.

In *Connally* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565, Mr. Justice Harlan, speaking for the court, said:

> The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative.

It can not seriously be argued that paragraphs (3) and (4) of section 13 of the Interstate Commerce Act, as amended by section 416 of the Transportation Act (41 Stat. 484); paragraph (6) of section 15 of the Interstate Commerce Act, as amended by section 418 of the Transportation Act (41 Stat. 484), and Section 15a of the Interstate Commerce Act, as amended by section 422 of the Transportation Act, are not integral parts of the machinery; that is, the raising of the revenues, the fixing of the divisions, and the recapture of the excess earnings all stand together. Opposing counsel, therefore, are wedged between the non-segregation of these several paragraphs on the one

side, and the opinions of this Court in the *Wisconsin Rate Case* and *New England Divisions Case* on the other side.

Moreover, it is conceded that "Paragraphs (2), (3), and (4) of section 15a undoubtedly constitute a regulation of commerce." The argument is that unconstitutionality begins at the point at which the so-called constitutional guaranty stops.

So, notwithstanding Section 502 and the three great decisions already announced, according to arguments of opposing counsel, the question recurs, Is the Transportation Act of 1920 a valid exercise of Congressional power?

VII.

THE FAIR RETURN.

The Commission has found the value of the steam railway property subject to the act and held for and used in the service of transportation at approximately $18,900,000,000. (*Ex parte 74*, 58 I. C. C. 229.) The exercise of the power of Congress which authorizes the Commission to increase rates to the public so as to earn a net return to each carrier of 6 per cent on the valuation can not in this proceeding be successfully challenged as confiscatory. The history of the act is that it was passed in the public interest which includes the interest of the carriers, and, to quote the language of this court:

> It is somewhat strange that that which was done in the interest of the carriers should be brought forward by them to attack the action of the Commission. (218 U. S. 109.)

In *Minnesota Rate Cases*, this Court said (230 U. S. 441) (Northern Pacific):

> The total net profits of the company for the fiscal year ending June 30, 1908, from its Minnesota business (interstate and intrastate) was found to be $5,431,514.56. This was *equal to 6.021% on the entire estimated value of the property.* (See also 230 U. S. 458.)

And again (230 U. S. 467) (Great Northern):

> The Master found that the cost of reproduction new of the entire system was $457,-121,469. The value of the portion of the system in Minnesota was separately found, on the basis of reproduction new, to be $138,-425,291. The net profits of the company during the test year from its Minnesota business, interstate and intrastate, were $8,180,025.11, *equal to 5.909 per cent upon this estimated value.*

Finally (230 U. S. 471) (Minneapolis & St. Louis):

> It thus appears that the net return from the entire Minnesota business in 1907 was *about 4.14 per cent on the estimated value of the property* ($21,608,464) *in Minnesota; in 1908, less than 3.5 per cent; and in 1909, less than 3.7 per cent.*

As to the Northern Pacific and Great Northern companies the orders of the Railroad Commission and the legislative acts of Minnesota prescribing the maximum rates for freight and a maximum of 2 cents a mile for passengers were sustained; as to the Minneapolis & St. Louis they were annulled as confis-

catory. It is well known that the Northern Pacific and Great Northern are two of the most prosperous and efficiently managed railroad systems in the country to-day. Neither is contesting the recapture clause and the counsel for the Northern Pacific is openly advocating its validity. Where is the Minneapolis & St. Louis [5] with the victory it won in the *Minnesota Rate Cases*?

There are those who contend that if all the railroads were placed in a single system it would be an unconstitutional act for Congress to impose upon them a scheme of rates which would yield less than a fair return upon the aggregate value; that the instant case is not different in principle because of the separation of the railroads into different systems; therefore the recapture clause is invalid because it takes from some roads part of their earnings and leaves to the roads in the aggregate less than the fair return upon the property in the aggregate.

Congress deals with the situation as it finds it. With the railroads divided into separate systems there is no constitutional obligation on Congress to make rates which will yield and leave in the hands of the railroads in the aggregate a fair return on the aggregate value. Take the situation in Minnesota. In that State the legislature fixed passenger rates which were held to be high enough for the Northern Pacific and Great Northern but too low for the Minneapolis & St. Louis. The practical

[5] W. H. Bremmer, Receiver. (See Official Railway Guide, September, 1923, p. 937.)

effect was that the Minneapolis & St. Louis had to charge the same low rates which were held to be lawful for the other two railroads. It would have been a more liberal rule to the Minneapolis & St. Louis and also to the Northern Pacific and Great Northern if the legislature had fixed rates on the basis of a fair return on the average value of the three properties and had then required the Northern Pacific and Great Northern to account to the Government for one-half of their surplus earnings. Congress considered that this result would be more liberal to all three railroads than the result which was actually realized under the rates which the Supreme Court held were sufficient for the Northern Pacific and Great Northern. It requires courage to claim that the more liberal rule is unconstitutional. The direct effect of the Supreme Court's decision was that it was constitutional to fix the rates for each railroad on the basis of its own rate of return.

Again, it has been said that the true rate-making rule is to make rates upon the basis of the average results of all the carriers, and anything that any carrier earns under this rule is its property and can not be taken away. Courts will not limit in this way the right of Congress to select the means of exercising its constitutional powers. Courts will not declare that any given rule of rate making is the only rule. There is no reason for the courts to say that Congress is prohibited from adopting some other rule of rate making, as, for example, that rates on prosperous roads shall be only such

as will yield them a fair return; in which event competition would force corresponding rates on the weak roads.

It has also been suggested that Congress has not the power to bankrupt the railroads by fixing rates for the prosperous roads which, while constitutional as to them, would, through competitive influences, leave other roads without a fair return. There can be no such operation of the constitutional principle. The Government might buy and operate a railroad between Chicago and New York and might charge exceedingly low rates. This might be disastrous to other railroads, but how could it be said that their property had been taken by legislative enactment without due process of law merely because they, as the result of competition, had been unfavorably affected by an act of the Government which in itself would be entirely lawful?

The court will not and ought not to look at the situation in a vacuum. It will look at it as a practical problem. It will realize that the rule in the Transportation Act was designed to help the transportation situation and did help it. If the railroads had gone back to private control without the specific rate-making rule prescribed in the Transportation Act, no reasonable person will doubt that the railroads could not have increased their rates to anything like the extent they were permitted to increase them under the Transportation Act. If the more fragmentary rules which had theretofore been applied had been applied to the new situation, it is perfectly clear that

the net increase would have been much smaller. It would be surprising if a rule which was intended to be more liberal in practice to the railroads, and which in fact was more liberal to them, should be regarded as unconstitutional, when the rules theretofore in effect of a more fragmentary character and affording less protection to the carriers would be regarded as constitutional.

If there are any carriers which have a constitutional right to object to the rule of the Transportation Act they are the weaker carriers, because the Act makes it practically certain that rates will not be high enough to give them a fair return. But those carriers are not objecting, and in the nature of things will not object, because the rule gives them more than they would otherwise get in practice. And it is impossible to see how carriers which are getting more than they are constitutionally entitled to can say that the rule that gives them that amount is unconstitutional.

Decisions are legion, and Congress took notice of them in enacting the Transportation Act, on the subject of the right of carriers to earn a fair return on the value of the property used in the service of the public. See *Chicago, etc., Ry. Co.* v. *Minnesota*, 134 U. S. 418; *Reagan* v. *Farmers L. & Tr. Co.*, 154 U. S. 362; *Smyth* v. *Ames*, 169 U. S. 466; *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388; *Minnesota Rate Cases, supra*. Likewise with respect to the classification of railroads, *C. B. & Q. R. R.* v. *Iowa*, 94 U. S. 155; *Grand Trunk* v. *Wellman*, 143 U. S. 339; *Dow* v. *Beidelman*, 125 U. S. 680, 688. That

each individual case must rest upon its own peculiar facts and circumstances, see *Covington, etc., Turnpike Co.* v. *Sandford*, 164 U. S. 578, 597. These are subjects which need not be argued at length.

VIII.

THE RECAPTURE CLAUSE IS FOUNDED ON PRECEDENT.

The principle upon which the recapture clause was founded was not unknown to our law. It is common knowledge that public utilities companies in some of the large cities, such as street car, traction, gas, and electric light, turn over to the municipalities all earnings in excess of certain amounts. Municipal ordinances so providing have frequently been accepted by public utilities.

In *Noble State Bank* v. *Haskell*, 219 U. S. 104, the Oklahoma act created a State Banking Board with power to levy upon every bank existing under the laws of the State an assessment of five per cent of the bank's average daily deposits, with certain deductions, for the purpose of creating a Depositors' Guaranty Fund. The purpose of the Fund was to secure the full repayment of deposits. If a bank becomes insolvent and goes into the hands of the Bank Commissioner, and its cash immediately available is insufficient to pay depositors in full, the Banking Board is to draw from the Fund (and from additional assessments if required) the amount needed to make up the deficiency. A solvent bank that did not want the help of the Depositors' Guaranty Fund challenged the validity of the act on the ground that

it could not be called upon to contribute toward securing or paying the depositors in other banks consistently with Article I, section 10 of the Constitution, and with the Fourteenth Amendment. This Court sustained the act.

In *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237, 244, 245, the legislature of Washington established a State fund for the compensation of workmen injured and the dependents of workmen killed in employments classed as hazardous; the law was made obligatory upon both employers and employees; the fund was the sole source of compensation and was supplied by assessments upon each employer of definite percentages of his total pay roll. Speaking for the Court, Mr. Justice Pitney, in sustaining the statute, said:

> In the present case the Supreme Court of Washington (75 Washington, 581, 583), sustained the law as a legitimate exercise of the police power, referring at the same time to its previous decision in the *Clausen Case*, 65 Washington, 156, 203, 207, which was rested principally upon that power, but also (pp. 203, 207) sustained the charges imposed upon employers engaged in the specified industries as possessing the character of a license tax upon the occupation, partaking of the dual nature of a tax for revenue and a tax for purposes of regulation. We are not here concerned with any mere question of construction, nor with any distinction between the police and the taxing powers. The

question whether a State law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operations and effect. *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268; *Stockard* v. *Morgan*, 185 U. S. 27, 36; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 227; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 28, 30; *Ludwig* v. *Western Union Telegraph Co.*, 216 U. S. 146, 162; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362. And the Federal Constitution does not require a separate exercise by the States of their powers of regulation and of taxation. *Gundling* v. *Chicago*, 177 U. S. 183, 189.

Whether this legislation be regarded as a mere exercise of the power of regulation, or as a combination of regulation and taxation, the crucial inquiry under the Fourteenth Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of its validity, and the burden of proof and argument is upon those who seek to overthrow it. *Erie R. R. Co.* v. *Williams*, 233 U. S. 685, 699. In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment rather than of private and particular interest, so as to furnish a just occasion for such intereference with personal liberty and the right of acquiring property as necessarily

must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for legislation.

* * * * *

To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when or in what particular plant or industry they will occur, we deem that the State acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it can not be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupa-

tion taxes limited to the actual losses occurring in the respective classes of occupation.

The idea of special excise taxes for regulation and revenue proportioned to the special injury attributable to the activities taxed is not novel. In *Noble State Bank* v. *Haskell*, 219 U. S. 104, this court sustained an Oklahoma statute which levied upon every bank existing under the laws of the State an assessment of a percentage of the bank's average deposits for the purpose of creating a guaranty fund to make good the losses of depositors in insolvent banks. There, as here, the collection and distribution of the fund were made a matter of public administration, and the fund was created not by general taxation but by a special imposition in the nature of an occupation tax upon all banks existing under the laws of the State. In *Hendrick* v. *Maryland*, 235 U. S. 610, 622, and *Kane* v. *New Jersey*, 242 U. S. 160, 169, we sustained laws of a kind now familiar imposing license fees upon motor vehicles, graduated according to horsepower, so as to secure compensation for the use of improved roadways from a class of users for whose needs they are essential and whose operations over them are peculiarly injurious. And see *Charlotte, Columbia & Augusta R. R. Co.* v. *Gibbes*, 142 U. S. 386, 394–5, and cases cited. Many of the States have laws protecting the sheep industry by imposing a tax upon dogs in order to create a fund for the remuneration of sheep owners for losses suffered by the killing of their sheep by dogs. And the tax is imposed upon all dog owners, without regard to the question whether their particular dogs

are responsible for the loss of the sheep. Statutes of this character have been sustained by the state courts against attacks based on constitutional grounds. *Morey* v. *Brown*, 42 N. H. 373, 375; *Tenney, Chairman*, v. *Lenz*, 16 Wisconsin, 566; *Mitchell* v. *Williams*, 27 Indiana, 62; *Van Horn* v. *People*, 46 Michigan, 183, 185, 186; *Longyear* v. *Buck*, 83 Michigan, 236, 240; *Cole* v. *Hall, Collector*, 103 Illinois, 30; *Holst* v. *Roe*, 39 Ohio St. 340, 344; *McGlone, Sheriff*, v. *Womack*, 129 Kentucky, 274, 283, *et seq.*

Learned counsel argue that the statutory half-and-half division between the Government and the company of the excess earnings is arbitrary; and if sustained it might subsequently be revised and the proportion of the company from time to time so reduced as to reach zero. Similar arguments in other cases have been rejected as irrelevant.

In *Atlantic Coast Line* v. *Corporation Commission*, 206 U. S. 1, 25, this Court said:

> The power to fix rates, it is urged, in the nature of things, is restricted to providing for a reasonable and just rate, and not to compelling the performance of a service for such a rate as would mean the sustaining of an actual loss in doing a particular service. To hold to the contrary, it is argued, would be to admit that a regulation might extend to directing the rendering of a service gratuitously or the performance of first one service and then another and still another at a loss, which could be continued in favor of selected interests until the point was reached where by compliance

> with the last of such multiplied orders the sum total of the revenues of a railroad would be reduced below the point of producing a reasonable and adequate return. But these extreme suggestions have no relation to the case in hand.

In *Noble State Bank* v. *Haskell*, 219 U. S. 104, 112, this Court also said:

> It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise.

Likewise the argument may not prevail that appellant, owing to claims and suits for loss and damage, overcharges, etc., may not close records and submit reports of earnings for a specified year because of undetermined liability, as it presents a general administrative question which clearly belongs to the rules and regulations of the Interstate Commerce Commission covering such matters. The Court would not determine such questions in advance of the facts of the particular case.

Opposing counsel try to make much of the language of the District Court that the recapture of the excess earnings was in the nature of a tax. One of the briefs points out that the Interstate Commerce Commission has not become a tax assessor and collector, that as the moneys are not paid into the Treasury by the carriers and paid out by the Treasurer that there is no tax, hence the District Court erred. The tax referred to by Mr. Justice

Brandeis in the *New England Divisions Case*, whose language is quoted in the opinion of the District Court (Tr. 68), is very much the same as the tax referred to by Mr. Justice Pitney in the *Mountain Timber Case* for which he cites authorities. The point does not require further discussion.

There is little in the briefs of opposing counsel which meets the holding of the District Court that appellant never acquired title to the fund as its absolute property but that it holds the same as trustee for the United States.

IX.

THE ARGUMENT THAT THE TRANSPORTATION ACT INTERFERES WITH INTRASTATE COMMERCE HAS ALREADY BEEN REJECTED.

In the original petition (Tr. 13), in argument at the Bar in the District Court, and in their brief in this court (Point IV, p. 99), learned counsel for appellant undertake to make a distinction between appellant's interstate and intrastate commerce. Conclusive against the point is the language of this court in *Wisconsin Rate Case* (257 U. S. 587, 588):

> Counsel for appellants are driven by the logic of their position to maintain that the valuation required for the purposes of §15a to be ascertained pursuant to §19a of the Interstate Commerce Act (37 Stat. 701; amended 41 Stat. 493) is to be only of that part of the property and equipment of the interstate carriers which is used in commerce among the States and must be segregated from that used in intrastate commerce. This

is contrary to the construction which since the enactment of §19a, March 1, 1913, the Commission has put upon that section in carrying out its injunction. It is inadmissible. The language of §15a refutes such interpretation. The percentage is to be calculated on "the aggregate value of the railway property of such carriers held for and used in the service of transportation." To impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This of itself prevents our giving the words such a construction unless they clearly require it. They certainly do not.

X.

CONCLUSION.

Copiously quoting language from the opinion of this Court in the *New England Divisions Case*, which carried with it reference to *Wisconsin Rate Case*, the District Court sustained the motion of the United States to dismiss the original petition. It builded its house upon the rock of this Court's decisions. We also rest our case upon the same sure foundation. The decree of dismissal appealed from should be affirmed.

JAMES M. BECK,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

NOVEMBER 3, 1923.

APPENDIX A.

(Ante p 17.)

Report No. 304, accompanying Senate Bill No. 3288, known as the Railroad Control bill, prepared by Senator Cummins (Iowa), Chairman Senate Committee on Interstate Commerce, November 10, 1919. (Cong. Rec., Vol. 58, Pt. 8, p. 8187.)

Mr. Cummins, from the Committee on Interstate Commerce, submitted the following report (to accompany S. 3288):

Within a few days after the organization of the Committee on Interstate Commerce for this session a subcommittee was appointed to consider the hearings which had been heretofore held upon the railway situation with a view of framing a bill and presenting it to the full committee. The subcommittee held almost continuous sessions for many weeks, and on September 2 the chairman of the committee introduced S. 2906 as the result of the work of the subcommittee. It was referred to the full committee and constituted the report of the subcommittee. Since that time the entire committee has been in session substantially every day, considering S. 2906. The committee concluded its deliberations on October 23, having adopted many amendments, and, thereupon, directed the chairman to introduce a new bill embodying the amendments which had been agreed upon, to have it referred to the Committee on Interstate Commerce, and immediately to report it favorably. This was done, and the present bill, S. 3288, is now on the calendar for disposition by the Senate.

The first thought which the committee desires to impress upon the Senate is the importance of an

early consideration of the measure and the establishment of a reasonably permanent status for our systems of transportation. It is unnecessary to enlarge upon the vital part which transportation plays in all the affairs of the country. The health, commerce, peace, prosperity, and growth of the United States are absolutely dependent upon adequate and constantly increasing facilities for transportation. Everybody understands that the existing condition is a temporary one; and, as we draw near the end of Government operation the demoralizing influences multiply. The conceded return of these properties to their owners, within a short time, necessarily destroys or at least seriously impairs the morale of the operating force and it becomes less and less efficient. A still greater difficulty lies in the fact that no plans can be made for future improvements in the way of additions and betterments to meet the growing demands of an expanding commerce. Naturally and properly, the Railroad Administration is disinclined to make expenditures of this character involving the execution of a program which, to be effectual, must be consistent and continuous, and the railroad companies are manifestly incapable of either making or carrying out provisions for the enlargement of their facilities for transportation. The result is a practical suspension of work in this direction. There is no practical way in which the period of partial paralysis can be avoided or prevented; but it is obvious, even to the most casual observer, that the period should be shortened by the most diligent attention on the part of Congress. It is to be hoped, therefore, that the moment the German treaty is disposed of the Senate will take up this bill and devote

itself, without interruption, to its consideration until it adopts whatever legislation may seem necessary to meet the very grave situation which confronts the country.

Before entering upon a review of those parts of the bill which relate to future regulation of interstate carriers and which establish a permanent policy with respect to the relation between the Government and our systems of transportation, it may be both interesting and helpful to explain briefly the method adopted by the bill for the return of the railroads to their owners and for the settlement of the accounts between the Railroad Administration and the railway companies.

The bill repeals the act of March 21, 1918, commonly known as the Federal control act, continuing it only in so far as is required to close up all matters growing out of Federal control. The act takes effect at midnight on the last day of the month in which it becomes a law, and at that time the transfer of the properties in the possession of the Government is to occur. All rights and remedies, both of and against the Government, are preserved. Without commenting in detail upon what these rights are, it may be said that it will be many years before all the matters growing out of Federal control will be adjusted, for the disputes already developed are numerous enough to occupy the attention of the courts for a decade. All that this report will attempt to do in that respect is to present an estimate of the uncontroverted condition as it will probably be on the 1st of January, 1920. The estimate has been prepared and furnished to the committee by the financial or accounting department of the Railroad Administration; but, as Mr. Sherley, who compiled

it, very well indicates, it is only an estimate, for many things may happen before the end of the year to affect it, and the reports for a month or two in the past are not completely analyzed.

To understand fully the financial statement about to be made, it is necessary to refer to the Federal control act under which the Director General of Railroads has been operating about 230,000 miles of our 260,000 miles of railways. Whether the President took possession of all the railways under the act of August 29, 1916, at the beginning of the year 1918 is a subject of controversy into which the committee will not enter at this time. It is sufficient to say that the act of March 21, 1918 (Federal control act), authorized the President to relinquish at any time prior to July 1, 1918, "control of all or any part of any railroad or system of transportation." About July 1 the President exercised this power and relinquished a large number of the shorter lines, retaining, as already suggested, something like 230,000 miles which had been from the 1st day of January, 1918, and still are being operated by the Director General of Railroads.

The Federal control act empowered the President to agree with each carrier whose property was taken over for the payment of a maximum compensation equivalent to its average annual railway operating income for the three years ending June 30, 1917. Upon this basis the aggregate annual compensation for the use of the railways passing into the hands of the Government and retained until the present time is, in round numbers, $900,000,000. At various times since the passage of the act the President has entered into contracts with the several railway companies, adopting his maximum authority as the

"standard return." With respect to the exact number of contracts so made the committee is not advised, but it has information to the effect that while in the main the larger systems are under contract there are yet quite two-thirds of the whole number of carriers whose property is being operated by the Government which have not signed what is known as the "standard contract." These companies may or may not sign in the future, and if they do not each of them will be entitled to recover from the Government the just compensation which the law may award. With regard to those carriers, very many in number, which claim that their properties were taken over on January 1, 1918, but which were formally relinquished prior to July 1, 1918, they may or may not be entitled to compensation; and they are mentioned only to say that they are not included in the statement of the existing financial relations between the Government and the transportation systems. The Director General has made contracts with some of these carriers, but the committee assumes such contracts have not been made under the authority to agree upon compensation but are merely traffic agreements of the general character that one common carrier may lawfully make with another.

According to the estimate of the Railroad Administration, the net operating income of the systems in the hands of the Government for the two years 1918 and 1919 will be $551,777,459 less than the compensation to which the carriers are entitled, computed as provided in the law and as prescribed in the standard contract; that is to say, when all accounts have been adjusted and paid the Government will have lost that amount in its two years of operation. It is

the opinion of the committee, without reflecting in any wise upon the Railroad Adminstration, that in the end the loss will be found to be much greater than the estimate submitted; but, however that may be, it must ultimately be paid from the Treasury of the United States.

As is well known, Congress has appropriated, in all, $1,250,000,000 for the use of the Railroad Administration. This sum, so far as the committee is advised, has been expended, or will be expended, for the purposes and under the conditions prescribed in the Federal control act.

Assuming that the Government's loss for the two years will be, in round numbers, $600,000,000, it is obvious that if the railways could pay on December 31 all that they owe the Government, $650,000,000 of the appropriation would be returned to the Treasury; but that will not be the situation, for it is entirely impossible for the railways to repay out of income the sums which have been advanced by the Government for additions and betterments—expenditures which are ordinarily charged to capital account. It will become necessary for the Government to pay the railways a large part of the compensation in order that the carriers may pay the interest upon their bonds and other fixed charges and make such distribution in the way of dividends as will prevent undue hardship among their stockholders. If the Government retains about $400,000,000 and applies that sum upon the amount due from the railways on account of additions and betterments, the Government would still carry about $525,000,000 of the additions and betterments. If, however, it shall carry for future payment all expenditures during the two years for additions and betterments, it

must fund nearly $950,000,000 on that account alone. If it is also to carry the amount of cash in the hands of carriers on January 1, 1918, taken over by the Government, and the balances in the hands of agents, the amount to be funded would be increased $383,000,000, making a total substantially of $1,300,000,000.

The bill before the Senate pursues a middle course with respect to funding the indebtedness due from the carriers to the Government, which is thought to be just both to the public and the railways. Nearly three weeks ago the committee asked the Railroad Administration to furnish a statement applying the provisions of the bill to the settlement of accounts and showing just what the result would be; but, up to this time, the statement has not been received. As soon as it comes in, it will be laid before the Senate.

October 22 the Railroad Administration, through the Director of the Division of Finance, sent to the chairman of the committee a letter which presents the basis of the general conclusions above stated, and it is thought but fair to the committee, and to the administration as well, that it be published as a part of this report. It is as follows:

UNITED STATES RAILROAD
ADMINISTRATION,
DIRECTOR GENERAL OF RAILROADS,
Washington, October 22, 1919.

Hon. A. B. CUMMINS,
United States Senate, Washington, D. C.

MY DEAR SENATOR CUMMINS: Pursuant to my promise of some time ago, and with apology for the necessary delay, I beg to give you below a statement showing, on the basis of the best estimate that we can make at this time, an approximation of the amount that would be needed to defray operating

deficit, the amount that the Railroad Administration will have temporarily tied up in various assets and the additional amount that will be required in order to aid in the liquidation of the affairs of the Railroad Administration.

You understand, of course, that the figures are necessarily tentative because the latest balance sheet of the Railroad Administration is for June 30, 1919, and necessarily the most careful estimates can not possibly disclose the precise facts as they would develop during the last six months, approximately one-half of which is still in the future.

The figures given are upon the assumption that disposition will be made in accordance with the terms of the standard contract. The other possible disposition suggested in amendments proposed to provide for funding a certain amount of the indebtedness of the railroads would naturally present the matter in a different aspect. I shall consider that further on.

In order to enable settlements with the railroad companies at December 31, 1919, it will necessitate the payment to them of approximately $326,541,893, arrived at as per the following table:

Accounts with the corporations immediately payable at December 31, 1919.

Due the Government:		
Demand loans		$53,078,186
Short-term notes		75,553,167
Open-account balances due Government	$220,053,510	
Less amount not now collectible	66,028,228	
		154,025,282
For additions and betterments, other than allocated equipment, financed from income		370,381,494
Allocated equipment financed under general equipment plan		200,000,000
For additions and betterments financed through open account due company		45,100,132
Total immediately payable to Government		898,138,261
Due the corporations:		
Balance due on compensation		855,395,851
Depreciation and retirements		304,179,281
Open-account balances due corporations		65,105,022
Total immediately payable to corporations		1,224,680,154
Amount needed to be appropriated to enable the Railroad Administration to immediately pay to the corporations the net amount due them		326,541,893

When the Railroad Administration shall have made settlement with the railroad companies in accordance with the foregoing, the situation will be as follows: The Railroad Administration will have expended and there will, in consequence, have been correspondingly consumed or tied up—

1. Amount necessary to defray operating deficit, the difference between the standard rental payable to the railroad companies and the estimated net operating income for the 24 months ended Dec. 31, 1919	$551, 777, 459
2. Amount of cash working capital necessary to leave temporarily with the corporations until the returns from the operation of their properties after Federal control become available	357, 943, 276
3. Amount of open account due Government by the corporations, representing payments by Government of corporate liabilities which the corporations can not repay at this time	66, 028, 228
4. Amount of additions and betterments' expenditures, including equipment, made to the railroad companies' properties during 1918 and 1919, which must be carried by the Railroad Administration for the time being	518, 075, 309
5. Improvements on inland waterways	14, 341, 886
6. Loans during 1918 and 1919 to railroad companies not immediately repayable	48, 375, 735
7. Boston & Maine reorganization	20, 000, 000
Total	1, 576, 541, 893

Appropriations heretofore made and applicable to the foregoing aggregate $1,250,000,000, so that to discharge its obligations as they exist at December 31, 1919, on the basis of the standard contract, the Railroad Administration will need an additional appropriation, it is estimated at this time, of $326,541,893.

Concerning the proposal to fund the indebtedness of the railroad companies to the Railroad Administration, it will be noted from the foregoing that a settlement under the contract contemplates that there will have been retained in settlement with the companies, on account of additions and betterments to their properties, the sum of $415,481,626, and that it is contemplated that even with that deduction from the compensation that the Government, nevertheless, will be carrying $518,075,309 of additions and betterments which the companies are not able to repay at this time, so that if the whole amount of

the indebtedness for additions and betterments should be funded the above appropriation would have to be increased by the amount of $415,481,626 and the Government would then be required to fund for additions and betterments the sum of $933,556,935.

Regarding the proposal of the corporations that the amount of the working capital taken over should also be funded, it is to be observed that at the beginning of Federal control the amount of cash in the hands of the treasurers, so taken over by the Railroad Administration, aggregated $239,190,605. In addition, the balances in the hands of agents and conductors aggregated $143,899,424.

If the proposal looks to the furnishing of these amounts in addition to amounts sufficient to pay off the liabilities of the Railroad Administration, that amount would have to be added to the requirements shown above. However, the fact is that the Railroad Administration used such cash and agents' and conductors' balances in liquidating the liabilities of the corporations in the earlier months of Federal control and it is to be assumed that a like process will take place at the end of Federal control.

If, therefore, the Railroad Administration leaves in the hands of the corporations a sufficient amount of working assets to liquidate its liabilities, not all of which must be paid simultaneously with the end of Federal control but which will be liquidated doubtless spreading over a period of from 30 to 90 days (it is true that a considerable part of such liabilities must be met in the first 15 days following the return of the roads to private control and a sufficient amount of cash or other quick assets should be left with the corporations to protect them), it would be ample protection to the corporations in point of working capital and would practically duplicate the situation as it developed when Federal control intervened.

As stated above, the Railroad Administration used the cash assets of the corporations, generally, for the payment of the corporations' liabilities. To the extent that there is a balance in the hands of the Rail-

road Administration, resulting from such transactions, the statement showing the account with the companies on page 2 of this letter, contemplates that such amount will be paid over to the companies except to the extent that any such amounts may be properly applied to the repayment of the indebtedness of the companies to the Railroad Administration.

To the extent that such process resulted in the Railroad Administration paying corporate liabilities in excess of assets, the account on page 2 of this letter contemplates, moreover, the collection thereof from the corporations only in cases where it is practicable for such corporations to make payment thereof from balances of compensation due them.

On this theory, the foregoing indicates that the Government will be required to carry, for the time being, balances due from the corporations on open account aggregating $66,000,000.

With reference to the amount shown above for working capital temporarily tied up, it should be observed that a considerable part of the assets of the Railroad Administration are represented by items other than cash. For example, traffic balances, accounts receivable, and various unadjusted items, both debit and credit, that are necessarily incident to a business of such magnitude and which can not finally be cleared up short of several months. The amount shown represents the balance between such unsettled assets and unsettled liabilities—the net being the figure which is shown as the amount which the Government will temporarily have tied up as working capital.

If for any cause the plan for a general equipment trust should not be carried out, there will be needed a sum greater than has been set up. How much it is now impossible to foretell. The general equipment trust plan contemplates a repayment to the Government of at least $200,000,000, which figure has been used in the foregoing statements. In the absence of a general equipment trust plan, some moneys could be immediately secured through equip-

ment trusts of individual carriers. Perhaps something like $100,000,000 could be obtained in this regard. So that the figure given above, $326,541,893, might need to be increased by $100,000,000.

I think it is desirable that I again emphasize the fact that this statement, though made from a somewhat detailed examination of accounts with the respective carriers, of necessity can not be considered as final. The need to forecast events more than two months away of itself introduces elements unstable enough to make conclusions necessarily tentative only.

In addition to that, it should be stated that there are various matters that will only reach adjustment and a status sufficient to enable them to be stated in financial terms after presentation and determination of claims respectively by the Government and the railroads touching many items incident to Federal control. So that in particular the item set out in the foregoing statement under the designation of "Amount necessary to defray operating deficit, etc.," must be considered as subject to considerable change in amount because of the subsequent bringing into it of debits and credits which can not now be even approximated. I am sure that you will appreciate these facts, and I emphasize them simply that a cursory statement of the figures therein submitted may not lead others to erroneous conclusions.

Very truly yours,

SWAGAR SHERLEY,
Director Division of Finance.

(The statement applying the provisions of the bill to the settlement of accounts and showing just what the result would be, heretofore referred to as not having been submitted, was subsequently furnished and is here printed in full, as follows:)

UNITED STATES RAILROAD ADMINISTRATION,
DIRECTOR GENERAL OF RAILROADS,
DIVISION OF FINANCE,
Washington, November 10, 1919.

Swagar Sherley, director; Charles B. Eddy, associate director.

MY DEAR SENATOR CUMMINS:

I am inclosing you herewith the following statements:

Statement A, which purports to show the amount of capital expenditures (exclusive of the cost of allocated equipment) and other indebtedness, that would be funded under the terms of Senate bill 3288.

Statement B, which purports to show the amount of capital expenditures (exclusive of allocated equipment) and other indebtedness, that would be funded under the terms of the section originally submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract.

NOTE.—In order that Statement B may be better understood, the section originally submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract is printed as an appendix to this report.

Statement C, which purports to show the amount of capital expenditures (exclusive of the cost of allocated equipment) and other indebtednesses, that would be funded under the terms of H. R. 10453 (the Esch bill).

Statement D, which purports to show the amount of capital expenditures on account of equipment purchased for the railroads and allocated to them, that is expected will be funded under the national equipment trust plan.

Statement E, which purports to show, in comparative columns, the effect of the refunding provisions in Senate bill 3288 (the Cummins bill), H. R. 10453 (the Esch bill), and amendment suggested by the Division of Finance of the Railroad Administration permitting

offsets in accordance with the standard contract; the statement also shows the amount of moneys which will need to be voted by Congress in order to carry out any one of these plans.

The financial differences shown on these tables between the funding provisions in the House bill and those in the Senate bill are due to the fact that the House bill requires deductions to be made first against indebtednesses other than that which grows out of expenditures chargeable to capital account, whereas the table touching results of the provisions in the Senate bill are, as noted, predicated upon deductions of amounts due on capital account first, and only subsequently upon deductions on account of other indebtedness.

I trust that these will give you the information you desire. To the extent that these figures differ from those in my letter to you of October 22, 1919, it should be stated in explanation that it is due chiefly to the fact that the estimate then hurriedly made had to be the result, in a large measure, of treating as a whole the accounts of the various railroads, whereas the present statement is the result of an elaborate detailed study of the accounts of each of the Class I roads. It should be borne in mind, however, in connection with these statements, as in connection with the previous one, that a large part of the tables submitted are necessarily estimates, as they forecast conditions to the end of the year and are predicated, even as to recent past months, upon estimates rather than upon the actual figures, which are not yet obtainable. They are, however, I believe, substantially accurate.

I regret that the intricacy of the problem, together with the illness of Mr. Parker, has delayed several days the supplying you with this information. I beg to remain,

Most sincerely,

SWAGAR SHERLEY,
Director Division of Finance.

Hon. A. B. CUMMINS,
United States Senate, Washington, D. C.

STATEMENT A.—*Amount of capital expenditures, exclusive of the cost of allocated equipment, together with other indebtedness due to the Government from the railroad companies, that would be funded under the terms of S. 3288.*

Total cost of additions and betterments which could be funded, exclusive of allocated equipment		$775,551,000
Amount which may be deducted therefrom (being the amount due on account of compensation or open account after the payment to railroad of sums sufficient to take care of fixed charges and regular dividends and working capital to the extent that money due permits of it)		223,823,000
Amount of capital expenditures, other than allocated equipment, fundable under terms of bill		551,728,000
Other indebtedness to be represented by demand notes		211,884,000
Long-term loans (N. Y., N. H. & H. R. R. and Boston & Maine)		68,375,000
Total indebtedness representing amounts funded and also amounts subject to payment on demand under the terms of the bill (exclusive of allocated equipment)		831,987,000

NOTE 1.—This table is built on the assumption that sums deductible from compensation and open account are applied, first, against capital expenditures rather than against indebtedness due on open account.

NOTE 2.—It is to be noted that this represents consolidation of estimates touching each of the roads, as to some of which there is money due them on open account, but as to most of which there is money due from them to the Government on open account.

NOTE 3.—This statement presumes the payment to the railroads of sums over and beyond their need for fixed charges and regular dividends of $321,815,000, as available for working capital. The estimated amount that would be needed by the railroads as working capital, if each road were given working capital on the basis of one month's operating expenses, would be approximately $353,000,000. The provisions of the bill provide, however, not that the roads shall be furnished with working capital, but only that deductions shall not be made from the sums to be funded unless working capital shall have been provided. The credits due the various railroads out of compensation and otherwise, after paying fixed charges, when worked out for the various roads, do not permit of additional payments in a sum greater than $321,815,000, which, therefore, is the amount

of working capital that the roads would receive after compliance with the terms of the bill. This means that some roads would get a sum equal to a full month's operating expenses as working capital, whereas some roads would not receive any working capital under this plan, and this latter class would be those roads most in need of working capital.

STATEMENT B.—*Amount of capital expenditures, exclusive of the cost of allocated equipment, together with other indebtednesses due to the Government from the railroad companies that would be funded under the terms of the section submitted by the Division of Finance of the Railroad Administration, permitting offsets in accordance with the provisions of the standard contract.*

Total cost of additions and betterments which could be funded, exclusive of allocated equipment	$775,551,000
Amount which may be deducted therefrom (being the amount due on account of compensation or open account after the payment to railroads of sums sufficient to take care of fixed charges and regular dividends)	415,016,000
Amount of capital expenditures, other than allocated equipment, fundable as permitted under the standard contract	360,535,000
Long-term loans (N. Y., N. H. & H. R. R. and Boston & Maine)	68,375,000
Other indebtedness, etc	158,646,000
Total amounts to be funded (exclusive of allocated equipment)	587,556,000

It is to be noted that under the terms of the standard contract, in addition to the amount of $360,535,000 to be funded, there would be indebtedness of the railroads to the Government to be evidenced by demand notes of the sum of $158,646,000, indebtedness on account of long-term loans to the New York, New Haven & Hartford Railroad and the Boston & Maine Railroad and other companies of $68,375,000; or a total of funded and demand indebtedness of $587,556,000.

NOTE 1.—This table is built on the assumption that sums deductible from compensation and open account are applied, first, against capital expenditures rather than against indebtednesses due on open account.

NOTE 2.—It is to be noted that this represents consolidation of estimates touching each of the

roads, as to some of which there is money due them on open account, but as to most of which there is money due from them to the Government on open account.

STATEMENT C.—*Amount of capital expenditures, exclusive of the cost of allocated equipment, together with other indebtedness due to the Government from the railroad companies, that would be funded under the terms of H. R. 10453.*

Total cost of additions and betterments which could be funded, exclusive of allocated equipment	$775,551,000
Amount which may be deducted therefrom (being the amount due on account of compensation or open account after the payment to railroads of sums sufficient to take care of fixed charges, regular dividends, and working capital to the extent that money due permits of it)	133,911,000
Amount of capital expenditures, other than allocated equipment, fundable as permitted under the standard contract	641,640,000
Long-term loans (including New York, New Haven & Hartford and Boston & Maine)	68,375,000
Other indebtedness, etc	69,876,000
Total amounts to be funded, exclusive of allocated equipment	779,891,000

It is to be noted that under the terms of H. R. 10453, in addition to the amount of $641,640,000 to be funded, there would be indebtedness of the railroads to the Government to be evidenced by demand notes of the sum of $69,876,000; indebtedness on account of long-term loans to the New York, New Haven & Hartford Railroad and Boston & Maine, and other companies, of $68,375,000, or a total of funded and demand indebtedness of $779,891,000.

NOTE 1.—This table is built on the assumption that sums deductible from compensation and open account are applied, first, against indebtedness due on open account rather than against capital expenditures.

NOTE 2.—It is to be noted that this represents consolidation of estimates touching each of the roads, as to some of which there is money due them on open account, but as to most of which there is money due from them to the Government on open account.

NOTE 3.—This statement presumes the payment to the railroads of sums over and beyond their need for fixed charges and regular dividends of $279,000,000 as available for working capital. The estimated

amount that would be needed by the railroads as working capital if each road were given working capital on the basis of one month's operating expenses would be approximately $353,000,000. The provisions of the bill provide, however, not that the roads shall be furnished with working capital but only that deductions shall not be made from the sums to be funded unless working capital shall have been provided. The credits due the various railroads out of compensation and otherwise, after paying fixed charges, when worked out for the various roads do not permit of additional payments in a sum greater than $279,000,000. This, therefore, is the amount of working capital that the roads would receive after compliance with the terms of the bill, which means that some roads would get a sum equal to a full month's operating expenses as working capital, whereas some roads would not receive any working capital under this plan, and this latter class would be those roads most in need of working capital.

STATEMENT D.—*Amount of capital expenditures on account of equipment purchased for the railroads and allocated to them that it is expected will be funded under the national equipment trust plan.*

Total cost of 100,000 cars and 1,930 locomotives	$372,000,000
Cash to be received through the sale of equipment-trust certificates to the public	200,000,000
Amount to be represented by equipment obligations held by the Government, secondary to those in the hands of the public, and to be payable in 15 installments	172,000,000

NOTE 1.—This table is predicated upon the carrying out of the national equipment-trust plan, and represents what is believed to be a conservative statement as to the amount of cash immediately available from such plan. It is impossible at this time to state more definitely the amount to be carried of the cost of this equipment, due to the fact that something under 10 per cent of the cars purchased have not yet been finally accepted by the railroads.

NOTE 2.—If the national equipment-trust plan should not be carried through, and separate equip-

ment trusts should be created for the financing of the obligations of the respective roads, it is likely that the Government would realize immediately in cash about $100,000,000 instead of $200,000,000, and correspondingly carry over a 15-year period some $272,000,000 rather than $172,000,000, in which event the moneys needed to be appropriated, as set out in Table E, would have to be increased by approximately $100,000,000.

STATEMENT E.—*Comparison of amounts to be funded.*

[(1) Under the provisions of Senate bill No. 3288. (2) Under the provisions of H. R. 10453. (3) Under the provisions of the section originally submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract.]

Class I roads.	Senate bill No. 3288.	H. R. 10453.	Standard contract.
1. Total cost of additions and betterments (excluding allocated equipment)	$775,551,000	$775,551,000	$775,551,000
2. Amount that may be deducted therefrom account compensation or open account due company	223,823,000	133,911,000	415,016,000
3. Net amount of additions and betterments (excluding allocated equipment) to be funded	551,728,000	641,640,000	360,535,000
4. Open account due Government, to be evidenced by demand notes	158,884,000	16,876,000	105,646,000
5. Long-term loans (including N. Y., N. H. & H. R. R. and Boston & Maine)	68,375,000	68,375,000	68,375,000
OTHER PROPERTIES.			
6. Additions and betterments and open account due Government, to be funded	53,000,000	53,000,000	53,000,000
7. Total amount of funded and demand indebtedness (exclusive of allocated equipment)	831,987,000	779,891,000	587,556,000
OTHER REQUIREMENTS.			
8. Allocated equipment not covered by equipment trust	172,345,000	172,345,000	172,345,000
9. Additions and betterments—inland waterways	14,342,000	14,342,000	14,342,000
10. Operating loss—21 months—all properties (note 2)	646,777,000	646,777,000	646,777,000
11. Total requirements	1,665,451,000	1,613,355,000	1,421,020,000
12. Appropriations already made	1,250,000,000	1,250,000,000	1,250,000,000
13. Appropriations now required (note 1)	415,451,000	363,355,000	171,000,000

NOTE 1.—The foregoing estimate is predicated upon the conversion into cash of all assets of the Railroad Administration, other than those shown above as being carried. In point of fact, in dealing with figures as large as these and matters as complicated, it will necessarily follow that there will be a considerable amount of assets of the Government subsequently convertible into cash that can not be

immediately realized, or even realized contemporaneously with the need of paying out on account of liabilities of the Government.

It is safe to estimate that this amount will be at least $200,000,000, so that, practically, to carry out the requirements under the Senate or House bill, or the substitute proposal in accordance with the existing standard contract, the Congress should appropriate a sum at least $200,000,000 in excess of that stated in item 13.

NOTE 2.—The operating loss shown above represents an estimate for the two years of Federal control of the amount by which the net operating income of the railroads fell short of the standard return, estimated amount of interest on accounts due from the Government to the railroad companies, and on accounts due from the railroad companies to the Government; and is predicated on the present basis of earnings, the latest available figures on an actual basis being for the month of August, 1919, so that for the last four months the figures are necessarily speculative.

The operating loss also includes an estimate of $95,000,000 on account of adjustment of materials and supplies, under provisions of the standard contract. It should be added that beyond these things there are various matters that will reach adjustment and a status sufficient to enable them to be stated in money only after presentation and determination of claims, respectively, by the Government and the railroads, touching many items incident to Federal control; so that in particular the item of operating loss must be considered as subject to considerable change in amount because of the subsequent bringing into it of debits and credits which can not now even be approximated.

APPENDIX.

The proposition submitted by the Division of Finance of the Railroad Administration permitting offsets in accordance with the provisions of the standard contract is as follows:

Any indebtedness of any carrier to the United States incurred for additions and betterments to roadway and structures, or betterments to equipment, made during Federal control and properly chargeable to capital account, which may exist at the time Federal control is relinquished, and after applying against it such indebtedness of the United States to such carrier as is permitted under any contract now or hereafter made between such carrier and the United States, or, where no such contract exists, as would be permitted by the terms of the standard contract between the United States and the carriers relative to deductions from compensation (sec. 7, par. b, of the standard contract), shall be payable, at the request of the carrier, in 10 equal, annual installments, the first one at the expiration of one year after the termination of Federal control, and one at the end of each year thereafter until all are paid, with interest at the rate of 6 per cent per annum, payable semiannually: *Provided, however,* That any carrier obtaining the funding of such indebtedness as aforesaid shall give, in the discretion of the President, such security in such form and upon such terms as he may prescribe, to insure the faithful and punctual payment by it of the principal and interest under the funding arrangement herein above permitted. Any other indebtedness of any such carrier to the United States which may exist after the settlement of accounts between the United States and the carrier shall be evidenced by notes payable on demand, with interest at the rate of 6 per cent per annum, and secured by such collateral as the President may deem it advisable to require.

With respect to any bonds, notes, or other securities acquired under the provisions of this section or under the provisions of said act of March 21, 1918, the President shall have the right to make such arrangements for extension of the time of payment or for the exchange of any of them for other securities, or partly for cash and partly for securities, as may be provided for in any agreement entered into by him or as may in his judgment seem desirable.

The President shall have the right, at all reasonable times until the affairs of Federal control have been concluded, to inspect the property and records of all carriers at any time under Federal control, whenever necessary or proper to protect the interests of the United States, or to supervise matters being handled for the United States by agents of the carriers, or to secure information concerning matters arising during Federal control, and the said carriers shall provide all reasonable facilities therefor.

Said carriers shall, upon the request of the President or those duly authorized by him, furnish all necessary and proper information and reports compiled from the records made or kept during the period of Federal control affecting their respective lines.

All powers invested in the President by this act, except those contained in section 7, may be executed by him through such officers, agents, or agencies as he may from time to time appoint.

All unexpended balances of money heretofore appropriated in the said act of March 21, 1918, or in the act of June 30, 1919, entitled "An act to supply a deficiency in the appropriation for carrying out the act entitled 'An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' approved March 21, 1918," are hereby reappropriated and made available until expended in the manner authorized in the said act of March 21, 1918, for the purpose therein and herein specified and of adjusting, settling, liquidating, and winding up all matters of whatsoever nature, including compensation, arising out of or incident to Federal control, and all moneys derived from the operation of the carriers, or otherwise arising out of Federal control, and all moneys that have been or may be received in payment of indebtedness of any carrier to the United States arising out of Federal control shall be and remain available until expended for the purposes aforesaid.

THE POLICY ESTABLISHED BY THE BILL FOR FUTURE CONTROL AND REGULATION.

Having made clear, as it is hoped, the terms upon which the railways are to be returned to their owners for private operation under public control and regulation, the committee advances to those parts of the bill which create the permanent system for such control and regulation. In considering this phase of the subject, it should be constantly borne in mind that if our policy is to be private operation of the instrumentalities of transportation there must be a large and constant inflow of capital. As commerce increases in volume, the facilities of transportation must increase; and, without reckoning the funds which must be secured to discharge maturing obligations already in existence, it will be conceded by everybody that immense sums will be required from year to year for new construction, additional equipment, and necessary improvement. The capital thus demanded must be drawn from those who have money to invest, and, of course, it must be voluntarily contributed. If the people who have money will not invest it in the transportation enterprise, private ownership and operation under public control must necessarily fail. It is apparent, therefore, that any legislation which may be proposed upon the hypothesis of private ownership and operation must tender to the future investor reasonable security for the investment he is asked to make and reasonable assurance of such yearly return upon his money as will induce him to enter the field. The better the security and the more certain the return, the less will be the rate required to attract the investment.

It is here that our present system of regulation has failed. Taking the railways as they are, with their widely varying conditions, both of construction and environment, it is wholly impossible for the Interstate Commerce Commission, no matter how wise and faithful its members may be, to prescribe schedules of charges for transportation that will be, at the same time, just to the public and that will maintain the railways which must continue to function if the people of the country are to be provided with adequate transportation. In a given competitive area the rates which will furnish one company a grossly excessive income will lead another into bankruptcy. The writer of this report is firmly convinced that when the Government assumed the operation of the railways they were, taken as a whole, earning all they should be permitted to earn; but, in the inevitable distribution of these earnings among the various railway companies, the railways which carried 30 per cent of the traffic were earning so little that they could not, by any economy or good management, sustain themselves. Nevertheless, it is unthinkable that these highways of commerce shall be abandoned, and some system must be devised not only for their continuance but for their betterment and growth. Government ownership would solve the problem, but it is the judgment of the committee that Government operation is attended with so many disadvantages—notably in the increased cost of operation—that this plan must be discarded. There is but one other solution. It is consolidation, and here two policies at once present themselves. The first, complete consolidation into one ownership; second, consolidation into comparatively few com-

petitive systems. The first has some advantages over the second, but it has some disadvantages, and the disadvantages outweigh, in the opinion of the committee, the advantages.

The superior efficiency of several systems need not be enumerated at length, but there is one consideration to which attention should be called: Competition, not in rates or charges but in service, will do more to strengthen and make public regulation successful than any other element which can be introduced into the business of transportation. Honorable rivalry among men is the most powerful stimulus known to human effort. For this reason largely the committee, recognizing the necessity for consolidation, determined in favor of the gradual unification of the railways into not less than 20 nor more than 35 systems; not regional or zone systems but systems that will preserve substantially existing channels of commerce and full competition in service. In the grouping of the railways into these systems another vital rule is to be observed, namely, that they are to be so divided that the operating incomes of the several consolidated companies will bear substantially the same relation to the value of their respective properties held for and used in transportation.

The procedure for bringing about the proposed consolidation may now be considered. The bill creates a transportation board, with large duties and powers, which will be more fully explained hereafter. It is mentioned now only because it is the governmental agency through which consolidation is to take place. Section 9 declares the policy of consolidation, prescribing that as soon as practicable and in the manner provided for in the act the railways of the

continental United States shall be divided in ownership and for operation into not less than 20 nor more than 35 separate and distinct systems, each of said systems to be owned and operated by a distinct corporation organized or reorganized under the act. Section 9 concludes:

In the aforesaid division of the said railways into such systems competition shall be preserved as fully as possible, and wherever practicable the existing routes and channels of trade and commerce shall be maintained. The several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the value of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of the railway properties involved in the comparison.

Especial attention is directed to the sentence last quoted, for it expresses the object to be attained; and until it is attained rate regulation can not be fully equitable to both the public and the carriers.

Immediately upon its organization the transportation board is to prepare and adopt a tentative plan for consolidation. The plan is to be submitted to a public hearing, at which it is assumed that all persons in interest will appear. After the hearings are concluded, a final plan is to be adopted and submitted to the Interstate Commerce Commission for its approval. This arrangement will make known to the whole country the consolidations which must eventually occur. Section 12 presents the authority for the reorganization of existing railway corporations, and all consolidations must be either through a reorganized railway corporation or one originally

organized under the terms of the act. It is to be noted, also, that if a partial and voluntary consolidation is carried into effect it must be in harmony with and in furtherance of the complete plan established by the board. Sections 21 and 22 provide for the original incorporation of railway companies; and, concerning this part of the bill, it need only be remarked that any such corporation must be organized "for a specific and defined purpose, namely, the ownership, maintenance, and operation of one of the railway systems or for the construction, ownership, maintenance, and operation of new lines or systems into which the railways of the United States are to be divided by the aforesaid board."

For the period of seven years after the act becomes a law voluntary consolidations are authorized under the strictest supervision by either the board or the commission. The distinctive feature of the voluntary as well as the involuntary consolidations is that the capitalization is not to exceed the actual value of the property held for or used in the transportation service. One of the chief causes leading to the public distrust of railway financing is the deep conviction on the part of the people that the present capitalization of many of the railways grossly exceeds the real value of the property which renders the service. When the Interstate Commerce Commission finishes the valuation in which it is engaged and when those values, as they are judicially determined and only those values, pass into the capitalization of the newly organized or reorganized corporations under this act, that serious obstacle in the way of effective regulation will have disappeared.

At the end of seven years after the passage of the act the compulsory consolidation begins. It is car-

ried out as provided in section 13. If, during the seven years, voluntary consolidation has accomplished the purpose, this section, of course, will not be operative; but, during the voluntary period, its presence in the law will be a compelling force which, in the judgment of the committee, will stimulate the present railway companies to carry forward the declared policy of Congress.

The full advantages of the proposed policy of consolidation can not be secured for 10 or 12 years. The railways must be returned to their owners at once. This situation makes it necessary to provide a plan for immediate relief that will tend at least to overcome the difficulties confronting us and render private operation possible.

A REVIEW OF THIS PLAN.

In this regard the bill attempts to accomplish three results:

First. By prescribing a basis of return upon the value of the railway property, to give such assurance to investors as will incline them to look with favor upon railway securities; that is to say, by making a moderate return reasonably certain to establish credit for the carriers.

Second. In making the return fairly certain to secure for the public a lower capital charge than would otherwise be necessary.

Third. In requiring some carriers, which under any given body of rates will earn more than a fair return, to pay the excess to the Government and in so using this exess that transportation facilities or credit can be furnished to the weaker carriers and thus help to maintain the general system of transportation.

To bring about these results, section 4 requires the Interstate Commerce Commission immediately to divide the country into rate districts, having in view the similarity or dissimilarity of transportation and traffic conditions therein and to institute hearings to determine the adequacy of the rates in any such district from the revenue standpoint and considered as a whole. The rule to be applied in passing upon such issues is announced in section 6, wherein it is stated that the rates shall be so adjusted "as nearly as may be so that the railway carriers as a whole allocated to each district and subject to this act shall earn an aggregate annual net railway operating income equal, as nearly as may be, to 5½ per centum upon the aggregate value, as determined in accordance with the provisions hereof, of the railway property of such carriers in the district held for and used in the service of transportation." To this basis the Commission is authorized to add, in its discretion, one-half of 1 per cent upon this value as a current contribution to improvements, betterments, or equipment unproductive in character, but which are customarily charged to capital account. This part of the revenue, however, if raised at all, is, in the future, not to be capitalized by any carrier whose net railway operating income for the year is more than the basis adopted; namely, 5½ per cent.

The basis thus established has been the subject of much criticism. On the one hand, it is asserted by the carriers that it is too low and will not enable them to obtain the money which they must have in order to develop their properties and provide further transportation facilities which the country demands. On the other hand, it is asserted with equal emphasis by some advocates representing the shippers that the

basis is too high and will give the carriers a greater revenue than they need or ought to have. There were differences of opinion in the committee with respect to the matter, and it is but fair to say that the basis presented is a compromise of these differences. It is believed, however, that both sides of the controversy somewhat exaggerate the facts, or rather fail to take into consideration all the facts which influence the subject. In reaching a conclusion it ought to be borne in mind that the property to which the basis is to be applied is railway property only; that is, the property which renders the service of transportation. All outside investments by railway companies are excluded. Further, in valuing these properties the commission is to be guided by the rules of the law and is not bound by either capitalization or by what is commonly known in the accounting system of the commission as "property investment accounts."

Those who insist so earnestly that the basis will provide insufficient revenue generally ignore the fact that at the present time there are outstanding more than eleven billions of railway bonds which bear an average interest of about 4½ per cent, and on that part of the value of the property the carriers will save 1 per cent. It must also be remembered that the 5½ per cent basis for a rate district will not give to each carrier in that district 5½ per cent upon the value of its property. To some carriers the return will be much higher and to others correspondingly lower. To illustrate: In the test period for ascertaining compensation under the act of March 21, 1918, the average net annual operating income of the class I railways was 5.2 per cent upon the aggregate property investment account. There are, however, wide differences

when the individual carriers are considered. Under this average, the New York Central System earned 6.09; the Pennsylvania Co., 6.26; the Pennsylvania Railroad, 5.36; the Delaware & Lackawanna, 7.54; the Erie, 3.56; the Baltimore & Ohio, 4.67; the Chicago, Burlington & Quincy, 7.02; the Chicago & North Western, 6.13; the Missouri Pacific, 4.43; the Union Pacific, 6.72; the Southern Pacific, 4.99; the Northern Pacific, 6.27; the Great Northern, 6.70; Atchison, Topeka & Santa Fe, 6.16; Chicago, Milwaukee & St. Paul, 4.71; Chicago, Rock Island & Pacific, 4.72; Chicago Great Western, 1.77; Chicago & Alton, 2.64; Western Pacific, 2.28; Colorado Southern, 3.04; Missouri, Kansas & Texas, 2.81; Texas Pacific, 3.76; Wabash, 2.91; Western Maryland, 2.58; New York, New Haven & Hartford, 5.96; Boston & Maine, 4.80; Cincinnati, Hamilton & Dayton, 1.95; Atlantic Coast Line, 5.76; Seaboard Air Line, 3.68; Southern Railway, 4.12; Louisville & Nashville, 6.32; Illinois Central, 5.48.

The basis adopted by the committee is three-tenths of 1 per cent higher than the basis of the test period; and, assuming, though not conceding, that the value of the property is equal to the aggregate of the property investment accounts, it will yield for all the railways a net operating income of $54,000,000 in excess of the income of the test period.

There were two considerations which led the majority of the committee to believe that this increase is not only warranted but necessary.

First. The railways are being returned to their owners when everything is unsettled and abnormal; when there is suspicion and distrust everywhere. Just what rate of return will enable the carriers to finance themselves under such conditions can not, with certainty,

be determined. It was therefore felt that some increase over the pre-war period is justifiable.

Second. As compared with all kinds of commodities, money is much less valuable than it was a few years ago, and it would seem to be only fair that the returns from railway investments should be reasonably advanced.

The committee, however, recognized that the present situation may be temporary, and that in the course of time the country may be restored to something like its former circumstances, and it provided for this very probable change in the last paragraph of section 6, as follows:

That in the year 1925 and in every fifth year thereafter the commission shall determine what, under the conditions then existing, constitutes a fair return upon the value of such railway property, and it may increase or decrease the 5½ per centum basis herein prescribed, or the basis for the determination of excess income.

These are the reasons, in chief and in brief, which convinced the committee that the 5½ per cent basis for computing the annual operating income of the carriers is fair and just, both to the public and the railway corporations.

It is obvious that if the law gives to the carriers the assurance of income heretofore mentioned there should be a maximum beyond which an individual carrier shall not be permitted to retain for its own use all it may receive under a given body of rates. Referring to the illustrations already given, it is seen that with uniform rates, and they must be uniform in competitive territories, one carrier will receive an operating income of 2 per cent, another 4 per cent, another 6 per cent, another 8 per cent, and others

still more. The bill fixes a standard of excess income and requires the carriers which receive an excess income (which will hereafter be explained in detail) to pay the excess to the transportation board for uses that have been mentioned and which will be more fully stated in a subsequent paragraph of this report.

Upon this requirement there has been a long-continued and earnest controversy before the committee. It has been contended by eminent lawyers that the provision is unconstitutional in that it takes property without compensation. It has been urged by equally eminent lawyers, and probably more of them, that it is not only constitutional but absolutely necessary if private ownership and operation are to be continued. It would unduly prolong this report to enter upon a review of the authorities or an argument which would embrace all the considerations which are material to the question. It is sufficient to say that a large majority of the members of the committee entertain no doubt with respect to the authority of Congress in establishing this policy. Heretofore the regulation of transportation has been regarded merely as a restriction imposed upon particular carriers. For the first time it is proposed to look upon transportation as a subject of national concern and from a national standpoint. It is the duty of the Government so to exercise its power of regulating commerce among the States and with foreign nations that all parts of a common country shall enjoy adequate transportation facilities at the lowest cost consistent with fairness to the capital invested and to the men who manage and operate these facilities. The commerce of one community, in these days, is deeply involved in the commerce of

every community in the land. All the railways we have, or substantially all, must be maintained; and, from time to time, they must be enlarged and additional facilities must be provided.

If the lawyers who insist that taking excess income is unconstitutional are right in their premises, their conclusion would be unassailable. They assume that all the earnings of a given railway under a prescribed body of rates become the absolute property of the carrier which receives them. This is not true under the system which the bill creates; and, therefore, the conclusion is unsound. If there were but one railway in the country, it would be entirely possible for the regulating commission to fix rates for it under which it could not earn more than 6 or 7 per cent upon the value of its property, but we have a thousand railways; and rates for transportation must be fixed with reference to all of them and to the needs of the people to whom all of them render their service. These conditions make it utterly impossible to fix rates which are reasonable for one carrier, considered apart from all the remainder. It is therefore in the competence of Congress to declare that the income which any particular carrier receives beyond a fair return upon the value of its property, it receives as a trustee for the public and not as its own absolute property. If this analysis of the power of regulation is not sustained, then the authority granted in the Constitution is a mere delusion.

With reference to excess income, the bill provides that any carrier receiving a net railway-operating income in any year of more than 6 per cent upon the value of its property, one-half of the excess between 6 and 7 per cent is to be placed in a company reserve fund, and the remaining one-half is to be paid to the transportation board. Of any excess above 7 per cent, one-fourth is to be placed in the company

reserve fund, and the remaining three-fourths is to be paid to the board. When the reserve fund equals 5 per cent of the value of the railway property and is maintained at that amount, one-third of the excess above 6 per cent is to be at the disposition of the carrier for any proper purpose, and two-thirds is to be paid to the board.

The company reserve fund may be drawn upon by the carrier whenever its annual net railway operating income falls below 6 per cent of the value of its property. The reserve fund is, of course, the absolute property of the carrier; and the purpose in requiring it to be created and maintained is to give stability to the credit of the carrier and enable it to render more efficiently the public service in which it is engaged.

The sums which are to be paid to the transportation board are to be placed in a general railroad contingent fund, which is to be used by the board, together with all its accretions, "in furtherance of the public interest in railway transportation," "in avoiding congestions, interruptions, or hindrances to the railway service of the United States," or "in furthering the public service rendered by them (carriers), either by way of purchase, lease, or rental of transportation equipment and facilities to be used by such carriers whenever the public interest may require or by way of loans to such carriers, upon such fair and reasonable terms and conditions in either case as the board may prescribe."

THE TRANSPORTATION BOARD.

Section 7 creates a new public authority for the regulation of commerce. Its title is "Transportation Board." It is to be composed of five members, until

the consolidation heretofore mentioned is complete and, thereafter, of three members. It is unnecessary to recite the details of its organization, for the bill itself is clear and explicit.

The first duty of the board is to prepare and, after hearing, adopt the plan of consolidation, which has been already fully set forth. Its general powers with respect to transportation are stated in the latter part of section 10, and these include certain functions now exercised by the Interstate Commerce Commission, among which may be mentioned the following: (*a*) The administration of the car service act; (*b*) of the safety appliance acts; (*c*) of the hours of service act; (*d*) of the locomotive boiler inspection act; and others of like character. It is also charged with a series of important duties relating to water transportation, mainly by way of investigation but leading to most important results. The committee hopes that this part of the bill will be carefully examined, for it is the first real recognition of the coordination of water and land transportation which must eventually be accomplished.

Section 11 confers further powers upon the board. These powers are new to our system of regulation, but are considered by the committee as essential. They look toward unification in operation where conditions demand either a diversion of traffic or a common use of facilities.

In section 24 the board is also given control over the issuance of railway securities. It is deemed unnecessary to enlarge upon this subject, because it has been so often before Congress that we are all familiar with it in a general way. The car service act, which is to be administered by the board, is

greatly enlarged; and, as now proposed to be amended, will be found in section 34. The thirteenth paragraph of section 6 of the act to regulate commerce is amended in important particulars, and the administration of that paragraph is given to the board.

Section 45, an entirely new regulation, which is intended to increase our export and coastwise trade by making it easier for the interior shipper to avail himself of the ocean routes, is to be administered by the board.

Having thus indicated the chief duties and powers of the transportation board under the bill, it may be helpful to state some of the reasons which led the committee to the conclusion that it is wise to create this additional tribunal in our regulatory system instead of committing to the Interstate Commerce Commission all the new duties and leaving with it all its present duties.

Every member of the Senate knows that the Interstate Commerce Commission is the most overworked body of men in the Government of the United States; its members are able and industrious, and they labor continuously from the beginning to the end of the year. Nevertheless, they can not keep pace with the demands already made upon them, and, oftentimes, justice delayed is justice denied. The bill the committee has presented increases tremendously the work which some body of men must do if its provisions are promptly carried into effect. It was apparent to the committee that it must adopt one of two alternatives: It must either recommend a very considerable enlargement of the commission, with such division into sections as would permit independent action; or it must recommend the creation of a distinct body. It chose the latter alternative. In

determining the division of work, power, and responsibility as between the two bodies, the committee has traced a clear, obvious line. It has not been able, always, to observe the exact distinction; but, in the main, it has succeeded in doing so.

The bill leaves with the Interstate Commerce Commission the quasi-judicial powers; that is to say, everything pertaining to rates and rate making will be as heretofore in the hands of the commission. The valuation of railway property, under the act of 1913, remains with the commission. The accounting or reporting system is to be conducted by the commission as inseparable from rate making. There are many other and most important duties to be performed by the commission, so many, indeed, that the committee has some doubt whether it will be able to do its work promptly. These, however, need not be specified, as a reading of the bill and a familiarity with the existing law will disclose them. The transportation board is given, chiefly, the powers which are more nearly and directly connected with the physical operation of the railways and the issuance of securities, power over the things tending for safety, both to employees and the public. It is believed that the division of powers and duties has been so adjusted that opportunity for conflict or discord is practically excluded. It may be here remarked that one of the most vital powers given to the board relates to the settlement or adjudication of disputes between railway employers and employees; but this part of the bill deserves separate consideration and to that subject the committee now invites your attention.

It is not necessary to enter upon the details of the establishment of the tribunals created for the adjudication of demands, disputes, and controversies which may arise from time to time between railway corporations and railway employees. These provisions will be found in sections 25, 26, 27, and 28 of the bill. It is sufficient to say that there are to be appointed three regional boards of adjustment and a committee of wages and working conditions. These four tribunals, made up in each instance of an equal number of men nominated by railway crafts and railway corporations, have original jurisdiction of all complaints, demands, disputes, and controversies between employers and employees which are not adjusted or settled between the parties themselves. In the event of the failure of these boards of adjustment or the committee of wages and working conditions to reach a decision, the transportation board has final authority; and, indeed, all decisions of these boards or the committee must be approved by the transportation board. It is intended in these sections to bring into existence governmental tribunals so composed that in so far as mortal man can do justice there will be complete, impartial justice done to both railway corporations and railway employees and to the public as well.

Hitherto the Government has not undertaken to adjudge the disputes which have so disturbed the field of transportation and which promise to be still more serious in the future than they have been in the past. All that legislation has done up to this time has been to authorize mediation and conciliation and to present an opportunity for voluntary

arbitration. After the most careful consideration it is the judgment of the committee that the time has come to make another advance in the settlement of disputes likely to end in the suspension or restraint of transportation. This forward step must be clearly understood in order to be justly considered. In a controversy between railway workers and railway managers with respect to wages and working conditions and which could only be settled by agreement between the disputants, the right to strike—that is, a concerted cessation of work—seems inevitable, for it is the only weapon which the workers could effectually employ. A proposal to prohibit an agreement among workers to quit their employment at a given time without substituting some other instrumentality for securing justice would not receive at the hands of Congress a moment's consideration. In making the strike unlawful it is obvious that there must be something given to the workers in exchange for it. The thing substituted for the strike should be more certain in attaining justice and should do what the strike can not do; namely, protect the great masses of the people who are not directly involved in the controversy. The committee has substituted for the strike the justice which will be administered by the tribunals created in the bill for adjudging disputes which may hereafter arise.

From the public standpoint and in the interest of the people generally it has become perfectly clear that in transportation at least both the strike and the lockout must cease. This country has been so developed, its population is so situated, its commerce so crystallized that regularity and continuity in transportation have become absolutely indispensable to the lives and health of the people and the existence

of our industrial and commercial welfare. A general suspension in the movement of traffic for a fortnight would starve or freeze, or both, a very large number of men, women, and children; and if it were continued a month or two months, it would practically destroy half our population. Our business affairs would be so disordered that the loss would be greater than in any conceivable war in which we might engage. It is just as much the function of the Government in these circumstances to see to it that transportation is adequate, continuous, and regular as it is to maintain order, punish crime, and render justice in any other field of human activity. It is clear, therefore, that the Government must settle the controversies between railway managers and railway employees which, if left to be fought out between the parties themselves, will lead to the consequences just described. There is but one way in which this can be done: The Government must undertake to declare, in any such case, what is justice, what is fair and right, between the parties to the dispute, and then there must be no concerted rebellion or conspiracy among those whose rights have been adjudged for the purpose of coercing either of the parties to the di pute into another and different settlement.

The railway unions are especially opposed to these provisions of the bill, and the committee addresses a word directly to them. In the step the committee has taken there is no hostility to unionized labor; no opposition to collective bargaining. Indeed, the unions and collective bargaining are necessary parts of the plan suggested in the bill. The unions can be more effective in securing justice under the proposed arrangement than they ever have been through the

strike, for, after all, even the most zealous of the union leaders must admit that their efforts through the strike, from their own standpoint, have substantially failed. The existing complaints with respect to wages and working conditions must be sufficient evidence to these leaders that they have not been able to attain their objects in the old way. Why not, then, exchange the instrumentality which they are now insisting upon and which can be tolerated no longer in a free country for a better one, namely, the justice of an impartial governmental adjudication? The committee is aware that the union leaders feel that they can not hope for justice from the Government, but in the opinion of the committee this distrust has no foundation and ought to give way to confidence and hope. If we can not organize tribunals which will do justice to employees, employers, and to the public in a business which so vitally affects the welfare of the Nation, then the Government is a complete failure and free institutions must be abandoned as an unsuccessful experiment. The committee believes that when the heat of the immediate conflict over this legislation has subsided a great majority of the railway workers will hail the substitution of intelligent and impartial tribunals, which will render justice to them, for the right to enter into an agreement or combination to destroy transportation as a deliverance, and as a better way to secure what rightly belongs to them than the methods which they have heretofore employed.

The committee has now reviewed those parts of the bill which propose legislation along lines distinct from those which have been already attempted. There are in the bill many amendments of the act to regulate commerce remedying defects which have been

disclosed in the administration of the present law; but it is believed that these corrections need not be specifically enumerated in this report. When the bill is presented in debate all these matters will be carefully explained.

It is but fair to say that this report has not been considered by the committee. It is the work of the chairman, and he alone must be held responsible for it.

APPENDIX B.

(Ante, p. 17.)

Statements of Representatives, speaking to the Conference Report in the House before the final vote.

Representative Madden (Illinois), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 9, p. 8833):

Objections are made by many to what is known as section 6 of the bill, who profess to believe that a guaranty of a fixed dividend rate to the railroads is provided. Now, what does section 6 provide? It provides that the Interstate Commerce Commission shall have the right to divide the railroad systems of the United States into groups, and that the property of each group, not the stocks and bonds, shall be valued by the Interstate Commerce Commission; that upon the value fixed by the commission a rate shall be made which will yield for the coming two years not in excess of 5½ per cent; that if more than 6 per cent is earned under the rate fixed on all the value of the property of the railroads within the group, used for transportation purposes, that one-half of the amount earned over 6 per cent shall go into the treasury of the Interstate Commerce Commission and be placed in a fund to be used from time to time for the purchase of equipment for the weak roads of the country and leased to such railroads at a rental charge that will yield the Government not less than 6 per cent on the amount so invested. This does not mean that the railroads are guaranteed the right to earn up to 5½ per cent; what it does mean is that they are restricted in their right to earn more without a division of the earnings with the Government. It does not mean that all the railroads in the group will earn 5½ per cent,

either. It is well understood that out of the 2,000 roads in the United States only about 300 are profitable. Some of these roads make large earnings on the same rates paid to the roads which make losses running within the same zone. The roads which make earnings are probably fortunately situated, in that they run through densely populated manufacturing sections of the country and rich agricultural territory. They are highly organized; their management is scientific; they have the brains, the genius, and the initiative that enables them to make profits where less ably managed roads running through less favorable territory make losses. These prosperous roads have always been permitted to retain all of their earnings. Henceforth they are to be restricted in their right to earn more than 6 per cent without a division with the Government. One-half of the excess earnings over the 6 per cent, as I have said, are to be turned into the fund for the upbuilding of the weak roads out of a system of loans by the Interstate Commerce Commission on proper security and under proper restrictions, thus affording to the communities through which these weak roads run an assurance of transportation facilities equal to those afforded to the people of every other section of the Nation.

Even the 5½ or 6 per cent of which I speak is not permitted to be paid to the road under this provision of the bill if the road does not make it. If the road makes but 1 per cent that is all it will get. If it makes 2 per cent it will get that, but the road that does not make has a certainty that out of the earnings of the prosperous roads which are taken by the Government it will have an opportunity to lease equipment furnished through the Interstate Commerce Commission and to make loans to enable it to build up its property, and thereby assist the community through which it runs in the movement of its commodities on equal terms with territory where more prosperous conditions obtain.

Representative Dewalt (Pennsylvania), February 21, 1920, said (Cong. Rec., vol. 59, pt. 4, pp. 3277, 3278, 3279):

Now, let us get down to the essence of this thing. I have prepared here in my humble way an argument as to the constitutionality of this clause in reference to rate making. I have some preliminary remarks here which I desire to have placed in the Record, but rather than take up the time of the committee—and only 15 minutes have been assigned to me—I proposed to get right down to the question that has been propounded by the gentleman from Kentucky (Mr. Barkley), to wit: Is this provision of rate making and this division of the excess earnings of these various companies constitutional or not? I have just as much reverence for the Constitution as the gentleman claims and no doubt has. I do not know a man upon the floor of this House who does not join in that sentiment. But there are various constructions of what may be or may not be constitutional. And right here I beg leave to differ with the gentleman in regard to this construction.

Now, let me give you, if I can, very briefly, the reasons for my belief. I have, preliminary to what I am about to say, summarized the provisions of this clause of the bill. I have pointed out, as well as I am able, that this bill endeavors and does actually consider the transportation systems of the country as a whole or in regional districts. I have tried to show that the bill considers that phase of the question, and that phase of the question only, in making up these rates, and determining what shall be a just, fair, and reasonable rate. And there can be no doubt that if anyone reads the bill he must come to the conclusion inevitably that the purpose of the legislators here was to consider the transportation system of the country as a whole or in regions to be designated by the Interstate Commerce Commission. Now, taking that as a premise, what follows?

During the consideration of railroads, and so forth, under Government control one should be able to free his mind from all prejudice, local sentiment, or personal interest, and at the same time try to legislate for the greatest good to the greatest number, regardless of classes or persons or interests directly and selfishly affected. This may be difficult, as all are naturally subject to the influences of environment and personal welfare, but the duty is imperative when one honestly desires to obtain the best results. The mere statement of some facts will demonstrate the above assertion. This legislation affects the welfare of all the people of this country, in number over 100,000,000. The mileage of the railroads in the year 1918 was 257,618 miles, and of this mileage 240,179 miles were taken over by the Government. The stockholders owning this mileage number 670,000; the bondholders of the various railroads over 300,000. In 1913, $1,200,000,000 of railway stocks and bonds were held by savings banks and trust companies, and it is now estimated that savings banks, with over 4,000,000 shareholders, held $1,500,000,000 in railway securities in 1918. In addition to this, it is estimated that the National and State banks hold at least $500,000,000 of railway securities and that the life insurance companies have of their assets above 30 per cent invested in such securities. Over 2,000,000 men are employed in railroad service, with a total pay roll of over $2,500,000,000 per annum, and the amount invested in 250,473 miles of line in 1918, with deductions properly made, was nearly $18,000,000,000.

* * * * *

I, however, shall refer to section 422, page 88, of the present bill, which contains the rule of rate making, and the discussion of which is found on pages 67 and 68 of the conference report. In brief, this section directs the commission to make rates adequate to provide the carrier as a whole—either in the entire country, or in rate groups or territory

to be established by the commission—with an aggregate annual net railway operating income equal, as nearly as may be, to a fair return on the aggregate value of the railway property held for and to be used in the service of transportation. The designation of the rate districts is left to the discretion of the Interstate Commerce Commission, and the same commission is authorized to determine the value of railway property, and is specifically directed not to give undue consideration to the property investment account of the railroads. The Commission is also authorized from time to time to determine and publish what percentage constitutes a fair return on the value of railway property, except for the two years beginning March 1, 1920. The bill declares in this section that 5½ per cent of the aggregate value of the railway property, as above ascertained, shall constitute a fair return, unless the commission in its discretion adds thereto, in whole or in part, one-half of 1 per cent of such value, to make provision for improvements and betterments, chargeable to capital account. The result of these provisions is that 5½ per cent is fixed as a minimum and 6 per cent as a maximum during the next two years, and thereafter the matter is left to the discretion of the commission.

The bill further provides, in this regard, that if any carrier earns in any year a net railway operating income in excess of 6 per cent of the value of its railway property, as above ascertained, one-half of such excess must be placed in a reserve fund until such fund equals 5 per cent of the value of the carrier's property, and thereafter may be used for any lawful purpose by the carrier. The other one-half of such excess income must be paid into a general railroad contingent fund to be administered by the Interstate Commerce Commission, and this contingent fund is to be used to make loans to carriers, to meet expenditures for capital account, or to purchase equipment to be leased to the carriers. The making of such loans and the obtaining

and leasing of such equipment are left to the discretion of the Interstate Commerce Commission.

The above analysis and statement briefly sums the gist of this portion of the bill. It will be noted the rate-making power still remains with the Interstate Commerce Commission, and it should also be noted that the commission shall not only initiate but that it has the right to modify or adjust rates, so that carriers—or as a whole in each of such rate groups or territories as the commission may from time to time designate—will under honest, efficient, and economical management and reasonable expenditures for structures and equipment earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. Let me call your attention to the phrase, "A fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation."

The commission is also charged with the duty of considering, in the making of rates, the transportation needs of the country and the necessity of enlarging such transportation facilities, and it is impressed with the duty of making rates uniform for all in the rate group or territory which may be designated by the commission, and further, that in consideration of this question of rates due consideration shall be given to all the elements of value recognized by the law of the land for rate-making purposes, but shall give to the property investment account of the carrier only that consideration which under such law it is entitled to in establishing value for rate-making purposes.

From the reserve fund above mentioned the carrier may draw a sum sufficient to pay dividends or interest on its bonds or other securities or rent for leased roads, except only, however, to the extent that its net railway operating income for any year is less than a sum equal to 6 per cent of the value of the railway property held for and used by it in the service of transportation, determined as hereinbefore referred to, and

this reserve fund shall not be drawn upon for any other purpose.

The purposes of the contingent fund have already been mentioned, but are more specifically set forth on page 94 of the bill under subdivision 10 of section 211. In brief, this contingent fund shall be used by the commission in the furtherance of public interests in railway transportation, either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account or by purchasing transportation equipment and facilities and leasing same to carriers—all such loans to be adequately secured—and if there is a balance remaining in the contingent fund it shall be invested in obligations of the United States or deposited in authorized depositaries of the United States from time to time.

Care has been taken in this summary to present the salient features of this portion of the rate-making provision, because argument no doubt will be made that the creation of such a contingent fund and such a reserve fund and payment to the Government of the earnings in excess of 6 per cent and dividing the same in the way designated by the provisions of the bill is unconstitutional, in that when a carrier under the rules and regulations prescribed, declaring how a rate shall be made and how it shall be earned, earns more than the designated per cent that the earning carrier is legally entitled thereto. In other words, that when a rate has been declared a reasonable rate, and that rate which has been ascertained by certain rules is also declared to be just and reasonable, no portion of the earnings obtained by such rate can afterwards be declared as unfair and unreasonable, and that the taking away by the Government, except by taxation or similar process, is unlawful and unconstitutional. I am frank to say that when I first met this problem my old-fashioned idea of the rights of property and the sanctity thereof inclined me to the belief that this position was well taken,

but approaching the matter with an open mind and a sincere desire to do what is best under all circumstances and having due regard to the legal phases of the question I am now of the opinion that this form of rate making and this division of excess earning above specified, 6 per cent, in the way provided in this bill is warranted by law. I desire, without unduly lengthening this argument, to give my reasons for that belief.

* * * * *

I take it, therefore, that the Congress has the right to fix the definite per cent under its regulatory power given by the commerce clause of the Constitution. I affirm also that such definite rate may be a certain amount, to wit, 6 per cent; and now what shall be done with the surplus earnings of any one road, providing that this road is in a group in a rate region or territory? This bill considers the transportation system of the country as a whole. It also considers it in regional territories and declares that in such territories the rate system shall be uniform.

The rights of the public are to have efficient transportation not only over one road but, if possible, over all roads in the country. The rights of the public are paramount and superior to the rights of any one unit in the transportation system. Under the rate-making power and under any rule that may be established it would be impossible to make all rates for all roads, considered as units, exactly just, fair, and reasonable. In the very nature of things some would be excessive and others to the contrary. It therefore follows that in order to serve the public by a general transportation system—considered as a whole, or, if you please, considered in regions—there must be some plan devised by which equalization can be obtained as nearly as possible, so that all parts of the system, as a whole or as a region, may be efficiently and economically administered, and a fair and a just return upon property investment honestly made.

If this bill did not consider, and in its very terms provide for, the use of this reserve fund and this contingent fund, obtained by the excess, in the way that it does, there might be some question as to the constitutionality of this provision; but the bill provides that a fair return shall be ascertained, and in making such determination the transportation needs of the country shall be taken into consideration, and that inasmuch as it is impossible, "without regulation and control in the interests of the commerce of the United States, considered as a whole," to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic, and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to the United States; and then the bill provides that the United States, when receiving this fund from the trustee, again becomes a trustee, and it shall expend this excess, which is then a contingent fund, for the furtherance of the public interests in railway transportation, either by making loans to carriers to meet expenditures for capital account, or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers as hereinafter prescribed, and that moneys in the fund not so employed shall be invested in obligations of the United States or deposited in authorized depositaries of the United States. What, then, becomes of this surplus fund above the 6 per cent? A portion of it is used to create a reserve fund for the benefit of the company, which portion shall not exceed 5 per cent of the honest investment of the company, in property held for and used in the service of transpor-

tation, and the other half of the excess income is to be paid into this general railroad contingent fund to be administered by the commission, not for the benefit of any one particular road nor for the benefit of a few particular roads, but for the benefit of the transportation system considered in regional districts as a whole where rate-making power has been enforced.

With all due deference, then, to the opinion of others, I maintain that this provision in the bill is not only constitutional, but that it is for the furtherance and conservation of the transportation facilities of the country.

Representative Coady (Maryland), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3300):

I could not present the case for a return of 5½ or 6 per cent better than to quote from an interview given by Mr. Commissioner Clark of the Interstate Commerce Commission, and printed in the Baltimore Sun of January 28 last. Mr. Clark is the oldest member of the commission in point of service and an authority of the highest standing.

He said, among other things:

"It is a matter of common knowledge that the operating expenses of the railroads of the country have increased in much larger proportion than their revenues. The first heavy increase in the wages of the railroad employees was made retroactive for six months or for one-half of the first year of Federal control; whereas the increase in rates was applicable only to the last six months of that year. Putting aside the question of the relationship between the wages and revenues for that year, and considering merely the calendar year just closed, the figures show that the operating ratio has been over 85 per cent. That means that out of every dollar received in revenues 85 cents has been paid out in operating costs, leaving 15 cents to cover taxes, interest on funded debt, and return on other investments. No railroad could operate successfully under such a ratio.

"CAN NOT HAVE TWO RATES.

"Now that the question comes as to whether we shall have by legislative direction a standard or recognized, reasonable level of rates. That proposition is contained in section 6 of the Senate bill. Our experiences of the past show that for an accumulation of many reasons, including advantageous location, wise administration, and popular management, some of the roads are very prosperous, and others are not, under the same level of rates. The unprosperous roads are important to the communities they serve and could not be abandoned without irreparable injury to many industries in these communities. They can not charge higher rates than the prosperous roads under competition, as that would be the surest way for them not to get business. The great mass of tonnage moves along the line of least resistance in the way of freight rates. Therefore, if increased rates are to be given to the unprosperous roads that need them, they must also be given to the prosperous roads which do not need them.

"The only way that the unprosperous roads can be afforded real relief is by fixing a limit on the amount which the more prosperous roads may retain out of their earnings under the established rates. Some say that this is unconstitutional. But I do not see any great difference in principle between that proposal and the policy we have been pursuing in other directions. For example, we have been collecting excess-profit taxes on the one hand and lending money in farm loans on the other, or we have been collecting income taxes graded in percentages according to the size of the individual income.

"Moreover, the plan proposed is just what would result if a single corporation or the Government owned all the railroads. The aggregate revenues in that case would be spread over all the properties, although some of them would earn more than the average and some less.

"5½ PER CENT NOT EXTRAVAGANT.

"A return of 5½ or 6 per cent is certainly not an extravagant one. Figures which we have compiled and presented show that the return from rates in past years of class 1 railroads, which are the railroads having gross revenues in excess of $1,000,000 annually, have reached a trifle over 5 per cent on the book cost of the roads and equipment.

"In the meantime the railroads of the country must continue to run under Government regulation. The fact that a plan presents some difficulties is no sound reason to condemn it if the principles underlying it are right."

My information is that even this rate will be totally insufficient to enable the roads to pay dividends to their stockholders, and the best that can be done with it will be the payment of the interest on their bonded indebtedness. But it will insure the operation of the roads under private ownership and control, and I believe this will prove to be the best thing for the shippers, the employees, and the public generally.

Representative Crisp (Georgia), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3295):

But it is said this conference report guarantees a fixed return of 6 per cent on the money invested in railroads for the period of two years. I again assert there is no such guaranty. The contention is made that the rate section of the bill gives such a guaranty. I quote the provision:

"SEC. 422. * * * (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a

fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

"(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient, and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per cent of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of 1 per cent of such aggregate value to make provision in whole or in part for improvements, betterments, or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account."

Under this provision the Interstate Commerce Commission is directed to group the various railroads of the United States into different zones. The commission is then to ascertain the actual value of the railroad properties in each zone, after eliminating all watered stock, and when the actual value of the property is ascertained the commission is to fix passenger and freight rates for each respective zone that will, with honest, economical, and efficient management, yield in revenue to the roads of the zone 5½ per cent. The Treasury of the United States guarantees nothing under this provision nor is there any guaranty to any particular road that it will

receive any fixed income. Under this proviso if a road makes 5½ per cent it keeps it; if it makes only 2 per cent that is all it gets.

Some roads, notably in the South and West, under this provision will barely make enough to keep them out of the hands of receivers, while other roads in industrial centers and in the thickly populated sections of the country will make a much larger income than 5½ per cent. Therefore any rate that will let the railroads operate in the undeveloped sections of the country is too great a rate for those sections where there is great commerce. Hence the conferees in this bill propose to take from all roads half of their profits in excess of 6 per cent and give such excess to the United States to be used as a revolving fund by the Interstate Commerce Commission to be employed to stimulate the transportation system elsewhere throughout the United States.

Representative Sanders (Indiana), February 21, 1920, said (Cong. Rec. Vol. 59, pt. 4, p. 3292):

Having given to the Interstate Commerce Commission the fullest authority to supervise the charges that shall be made and to determine the manner in which capital may be secured, and having granted to the commission the power to fix rates, we have determined as a legislative policy that the roads in any given rate group considered as a whole, which are honestly, efficiently, and economically managed, shall have such rates as will yield a fair return on the property value. For a period of two years this is fixed as nearly as may be at 5½ per cent. This function of the commission does not differ materially from the function already exercised by the commission, except that the bill adopts the 5½ per cent for two years as a matter of legislative policy rather than leaving it to the commission.

The clearest illustration of attempting to meet the railroad problem in a constructive way is found in the provision for a recapture by the Government, to be be used for transportation purposes, of one-half the

amount earned by any road above 6 per cent. Where you have two competing roads between two shipping points these roads of necessity must charge the same rate, otherwise the road charging the lesser rate would get all the traffic. Yet a rate fixed for the carriage of freight between those points might yield an unconscionably large return to one road, which by reason of a better route, roadbed, or other similar causes was able to operate at less cost, and yet the yield for the other road might not be large enough to even approach a fair return. This is the problem of the strong and the weak road, and that has been called by many students of the subject the real railroad problem.

I have reluctantly yielded to this doctrine of recaptured earnings. I do not believe in it at all upon principle, but its use in this case affords an apparent solution of the most perplexing question connected with the regulation of transportation.

Representative Black (Texas), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3294):

Mr. Speaker, I next want to discuss briefly that provision of the bill which introduces a definite and plain rule of rate making, and which has been frequently, erroneously, and unfairly referred to as a guaranty of earnings to the railroads. In my opinion, this is one of the best and most constructive provisions of the bill, and one which will do more to solve the difficulties of the railroad situation than any other.

In the first place, it is not in any sense a guaranty of earnings to any railroad. A Government guaranty of 5½ per cent would mean an attempt to assure a given income independently of rates, instead of assuring adequate rates subject to a limit of income. This bill does not assure or guarantee any railroad any specified earnings. It simply directs the Interstate Commerce Commission to grant a rate on the aggregate value of the roads which will, as nearly as may be, yield 5½ per cent to railroads which are

honestly, efficiently, and economically managed. Is there anything unfair or unjust about that? I do not think so, and, in my judgment, anything less than that would not only be unfair and unjust, but would be a shortsighted policy in the caring for the public interest. Capital can not be conscripted to invest in any given industry, and unless it is given a reasonable assurance of protection it simply will not invest, and the particular industry involved must of necessity deteriorate and drift to bankruptcy.

Now, what is the situation as to the railroads? Of the 162 railroads or systems, 109 operate under conditions coming under the head of "less favorably situated." These 109 roads have a total mileage of 120,755, and serve double the area of territory served by the 53 remaining roads. You can not make a railroad rate for each railroad. You can not adjust rates to where they would barely meet the requirements of the 53 large roads without starving the less favorably located roads, but which are just as useful and essential to the territory which they serve as the stronger and more wealthy roads.

Representative Pou (North Carolina), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3301):

The conference report provides for a fair, reasonable, just return to the invested capital. No fair-minded man ought to complain at a return of 5½ or 6 per cent. The American people who support the railroads will not complain, but the railroads may as well understand that promptness and efficiency in freight and passenger service must follow. No fair-minded merchant is going to complain if the railroads are permitted to earn 5½ or 6 per cent from the freight rate he is required to pay if he gets prompt delivery. The price of all commodities has advanced. No one expects freight and passenger rates to remain stationary, but those who travel and those who ship and receive freight have a right to expect more efficient service.

Mr. Speaker, to my mind the alternative is presented—take this report of the conferees or make ready for Government ownership. For my part I say, good Lord, deliver this Nation from Government ownership. Almost anything is preferable to Government ownership and Government operation of the railroads. Of course, it is the duty of every Member of this House to vote as if the result depended on that vote. Politics has no place in the consideration of such legislation. I am convinced if the railroads are returned to private ownership on the 1st of March without any legislation, as has been suggested, the most appalling financial disaster of recent years will follow. Almost all agree that some legislation is necessary to prevent a breakdown of the transportation system of the Nation.

To my mind the alternative is presented—take this report or take something infinitely worse. For these and other reasons I shall vote to adopt the report.

Something has been said about Wall Street dictating this report. I have served for 19 years with the gentleman from Wisconsin (Mr. Esch). When the new moon turns to green cheese, and not until then, will it be within the power of any man to dictate a report that John Esch writes as a conferee of this body.

Representative Kinkaid (Nebraska), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 9, p. 8886):

The report has gone abroad that the bill contains a guaranty of a profit or dividend of 5½ per cent to the railways, but the able chairmen of the House and Senate committees have both explained that this clause does not guarantee any certain profit or dividend to the roads, and in substance that it constitutes a limit upon the earning power, the amount which shall be made and retained by the railroads; that not more than 6 per cent profit or dividend can be realized without yielding one-half of the excess thereof to the Government, to be devoted as a re-

volving fund to the improvement of railways in general.

But, viewed in a general way, the prosperity of the railroads is necessary to their continued and efficient operation. Adequate accommodations can not and will not be afforded unless a reasonable income shall be realized, and thus there are involved the interests of every shipper and every passenger and the interests of everyone in any way concerned, directly or indirectly. It is very plain, too, that the roads must produce reasonable financial returns or adequate wages and salaries can not be paid the employees. It logically follows that every industry and all of the people have a community of interest in the efficient and successful operation of the railways, and this means that they must be reasonably prosperous that the end may be realized; hence the necessity and justification for granting the financial aid provided by the bill.

Representative Cooper (Ohio), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3308):

There has been much unfair and misleading criticism of the financial provisions of the conference report. The bill says that there shall be a return of 5½ per cent on the actual property valuation of the railroads, which is to be determined by the Interstate Commerce Commission. Watered stocks are not validated, and in fact under the bill it will be possible for the Interstate Commerce Commission to squeeze false values out of railroad securities. Those who are so free to talk about big business interests benefiting by Government financial aid to the railroads should remember that there are 670,000 individual holders of railroad stocks and 300,000 owners of railroad bonds, and that a very large percentage of railroad securities are owned by insurance companies and savings banks. Hundreds of thousands of people who have life-insurance policies or are depositors in savings banks are directly interested in the value of railroad securities, and it has been stated that if the

railroads go back to their owners without financial cooperation by the Government very many of them will go into bankruptcy. The interests of insurance policyholders and savings depositors must be protected.

Representative Echols (West Virginia), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 9, p. 8844):

There has been much said about the so-called guaranty clause found in the bill. I fail to find anywhere in this bill where the Government guarantees to any railroad either 5½ or 6 or any other per cent upon the value of its stock or the true value of its property. There is no such guaranty. There is a contingent fund provided that is made up of the excess of 6 per cent earned by the strong roads of the country that is to be placed in the hands of the Interstate Commerce Commission as a trustee, which may be loaned to the weaker roads for equipment, and so forth. There is no tax levied upon the people to create this fund. I would vote for the bill if I lived on the line of the most prosperous railroad in the country.

Representative Sims (Tennessee) February 21, 1923, said (Cong. Rec. Vol. 59, Pt. 4, p. 3290):

How is it conceivable that the weak roads can be strengthened by depriving the strong roads of a part of their net earnings for the benefit of weak roads without having the direct effect of weakening the strong roads to the extent of their net earnings so taken?

It is not thinkable that the weak roads can be strengthened by the aid that they receive from the net earnings of the strong roads without weakening the strong roads in a like ratio by the loss of net earnings. The result will be that the combined strength of all the roads will be no greater by reason of the operations of the contingent fund than the combined strength of all the roads was prior to establishing such sinking fund. As the value of railroad property depends entirely upon net earn-

ings, the reduction of net earnings must necessarily reduce the value of the property of the railroad whose net earnings have been taken and to the extent the value is so reduced the railroad's property has been taken by the Government without just compensation, which is unconstitutional. I do not see how the President can fail to veto this bill on account of this unconstitutional excess-earnings contingent-fund provision. But regardless of any constitutional difficulty, I am unalterably opposed to providing for any definite, specific, statutory net return on the value of railroads, whether valued as single railroads or in systems or by groups, and I am firmly opposed to the recapture of any portion of the net earnings of any railroad in excess of such fixed statutory return. Such proposed recapture provisions in this bill will certainly tend to reduce and stifle individual incentive and enterprise and will result in discouraging the building up and improving of existing railroad properties and will put a stop to the construction of additional new lines, so badly needed in some sections of the country.

This bill provides that the Interstate Commerce Commission on its own initiative may establish both minimum and maximum rates, fares, and charges. This is a new departure in our interstate-commerce law. Heretofore the commission has only had power to determine a reasonable maximum rate. Just what effect the exercise of this new power will have upon rail rates as a whole remains to be seen. But it certainly empowers the commission to eliminate all competition as to rates. But, strange to say, this bill also authorizes the commission to divide the whole continental United States into competing systems. How are we to have competing systems of railroads if common minimum rates are to be established for all these systems? No road can reduce its rates to meet the demands of its shippers below the established irreducible minimum.

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By the mandatory provisions of this bill the commission must establish a level of rates that will produce a net income of not less than 5½ per cent on the value of all the railroad property in the United States taken as a whole or in groups less than the United States as a whole. Therefore, the minimum level of rates can not and must not be less than will be necessary to produce the 5½ per cent net return on all the railroad property in the rate-making areas. The imperial State of Texas can not put into effect an intrastate rate that would be valid if the rate, in the opinion of the commission, would result in giving rates within Texas that would be less than the established minimum level, or that might, in the judgment of the commission, tend to reduce the minimum net return below 5½ per cent on the railroad property as a whole in the rate-making district in which Texas is a part.

Representative Kitchin (North Carolina), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3311):

Mr. Speaker, I have listened carefully to all the speeches made to-day by the advocates of this report. It was strikingly noticeable, first, that no one declared that this report, if adopted, would be helpful to the people or a benefit to the producers and consumers. Not one asked the House to vote for it on the ground that it was in the public interest. All asked for its adoption on the ground that it would help the railroads—that it would benefit the stockholders and bondholders of the railroads. Some asserted it would not hurt labor. None declared it would not hurt the public. They seemed unmindful of the fact that the only way this report would help the railroads was by hurting the people; that in thus favoring helping the railroads they favored putting an increase of the burdens on the Government and the taxpayers and on the shippers and producers and consumers of the country. The only possible way this bill can help the railroads is at the expense of the Government, the taxpayers, and the people.

* * * * *

There never was a time in the history of the railroads that every railroad in the United States made money; that every investor in railroad stocks and bonds realized a profit. At all times some railroads did not make money; some investors in stocks and bonds suffered losses. Heretofore investors in railroads and their securities, like investors in every other kind of business, took the chance of gain or loss. There never was a time when some railroads were not in the hands of a receiver. But with the adoption of this report, hereafter the Government, for the first time—and I believe the first Government on earth to do it—practically guarantees—that is, compels the Interstate Commerce Commission to insure the making of money, more or less, by every railroad in the United States and the realizing of profits by every investor in railroad stocks and bonds.

It is said by the advocates of this bill or report, by the congressional authors of the bill, that there is no such guarantee. True, there is no such guarantee directly out of the Treasury and pockets of the taxpayers, but there is a practical guarantee that it shall come out of the pockets of more than a hundred million people—out of the pockets of the consumers in the United States. This bill, this report, expressly directs the Interstate Commerce Commission to so adjust or increase the rates throughout the United States, or in groups or regions, if in the discretion of the Interstate Commerce Commission it shall so divide the United States, so that it will insure at least an average return of profit of 5½ per cent—and the commission can increase it to 6 per cent, and after two years can increase it to over 6 per cent—upon the aggregate value of the railroads in the United States, or in such groups or regions as the Interstate Commerce Commission may fix.

The supposed or nominal authors of this provision and its advocates vigorously deny that there is any such practical guarantee or assurance. The nominal authors of the bill should not be criticized for this

denial, because since they did not conceive and prepare this provision of the report, the same being conceived and prepared by a prominent railroad president, it is quite natural that they would not understand its meaning and effect quite as well as if they themselves were the real authors of it.

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And after two years the commission may fix the percentage of return—that is, declare what the minimum fair return will be, but under the necessary implications of this report the commission will never put it at less than 5½ or 6 per cent, and it may be much more. *No man with sense can read that provision without knowing that it is a practical guaranty that every railroad shall make money and every investor in stocks and bonds shall realize a profit.* The only difference between this and an actual guaranty direct by the Government is that by the actual guaranty the profits or money guaranteed would come out of the Treasury and taxpayers, while under this provision the guaranty or assurance comes out of the pockets of the shippers and producers of the country, but finally out of the consumers. These provisions are mandatory on the commission.

I wish now to direct your attention to another plain proposition contained in section 422. You will observe that the rates of the roads throughout the United States, or in the groups or regions which the commission may fix, must be uniform; that is, when the rates on one road are increased, the same increases shall be had on all other roads in the group, whether such roads require such increased rates or not. In other words, it means that in order to increase the rates on a road that is not making sufficient money or sufficient profits for its investors, the rates upon a road which is making sufficient profits under existing rates shall also be increased. It makes the farmers, merchants, and manufacturers, and other producers living along the line of the road that requires no increase in rates, one making sufficient

money or profits under existing rates, pay increased freight and passenger rates in order to help some other road that is not making sufficient profits to make more money. Why should the farmers, merchants, and manufacturers living in my district be forced to pay increased rates when the existing rates are sufficiently high to enable the railroads there to make reasonable profits in order that some road, perhaps 500 or 1,000 miles away, on which they never traveled a mile or shipped a pound or bushel of freight, may increase its rates to its farmers, merchants, and manufacturers to satisfy the avarice of its investors? Such a proposition from every viewpoint is simply monstrous. It violates every fundamental principle of justice and fair dealing.

Let me direct your attention to another unjust, unfair, and, in my opinion, unconstitutional provision in this section 422. It provides that when a road, whether its rates are increased or not, makes a net return of over 6 per cent, that one-half of the excess shall go into a Government fund, controlled by the commission, for the purpose of loaning it to other roads or with which to buy equipment to rent to other roads. In other words, it takes the profits from one road that is well circumstanced, honestly, wisely, and efficiently managed, and gives it by way of loans and rentals to another road, perhaps a competing road, not so economically and efficiently managed. It thus puts a penalty upon honesty and efficiency and a reward upon inefficiency. This strikes me as being against every element of right and justice. It has the fundamental elements of socialism and communism. It deliberately takes by law the property of one who succeeds and bestows it upon another who fails to succeed. As indicated a moment ago, in my judgment this provision is unconstitutional.

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I feel it my duty before concluding to congratulate the authors of the report in that it contains no deception, no evasions, no obscurities, no jokers. There is no attempt to mislead, no intention to deceive. Its

terms and provisions are unmistakably plain. No one who reads it can possibly be misled or can possibly misunderstand. Its meaning is audaciously clear. The boldness in making clear by its terms and provisions the real purpose of its authors that this is a report, a bill, to protect the railroads and to promote the interests of their stockholders and bondholders for all time at the expense of the people is both commendable and attractive. Its purpose and effect is not only to increase to the holders the value of their securities but to insure that holders and investors in railroad securities shall have at all times and at all hazards safe margins of profits, although every other business and every other investor may, in the paralysis of hard times and falling prices, be sustaining a loss. The present holders of railroad stocks and bonds will by this bill, if its design is accomplished, have their securities increased at least $2,000,000,000. Such favoritism to the special interests is unwarranted by any condition or fact. It is vicious and intolerable.

Mr. Speaker, the owners have been clamoring for the return of the roads since the armistice, and now when the Government is ready to return to them the roads, to receive them they charge the Government in gifts, loans, guaranties, and extensions of credits nearly $2,000,000,000, and in addition they demand the surrender by the States of all control over the intrastate commerce, and in further addition they demand their exemption from the antitrust laws.

The stockholders and bondholders of the railroads dictated and the conferees wrote into the report the terms and conditions upon which they would receive their own property, under the threat that if their demands were not granted they would bring chaos upon the country. One of the essential provisions which, as many advocates declared, causes them to support this report was conceived, prepared, and written by a prominent railroad president, chairman of the association of holders of railroad securities, and forced by him and other railroad officials into the report. The distinguished chairman (Mr. Esch) dis-

closed this fact in his speech on November 19, presenting the Esch bill. He was then making an argument against the same provision, which was then in the Cummins bill—a stronger argument against it than to-day he has made for it. What railroad president or official or what stockholder or bondholder wrote the other provisions of the bill I do not know. The distinguished chairman has not told us, but I do say that this is a railroad bill, for and by the railroads, for and by the stockholders and bondholders. Advocates of the bill have shown by their speeches that this is a fact; that in this bill the Government, the people, the shippers, the producers, and consumers have not had a look in, nor have they had a chance even before the people's representatives to have their interests protected.

Representative Barkley (Kentucky), February 21, 1920, said (Cong. Rec. vol. 59, pt. 4, pp. 3272, 3273, 3275):

The Government, however, has done much more than merely made good this loss. It has advanced to the roads out of the Treasury practically a billion and a quarter of dollars. Congress has already appropriated $1,250,000,000 and the pending bill carries an additional appropriation of $200,000,000, and the railroad Administration informs us, through the director of finance, Mr. Sherley, that $436,000,000 more will be necessary as soon as the roads are returned to their owners, making a total of $1,886,000,000 taken out of the Treasury of the United States for the benefit of the railroads. The human mind refuses to grasp these enormous figures, but we may catch a faint conception of what they mean when we understand that this sum represents nearly one-third of all the taxes paid into the Federal Treasury by the American people during the year just closed. Whether still other appropriations will be required need not now be discussed, but we may be prepared to expect that they will be requested if the amounts already provided for are not sufficient.

When this railroad bill was originally introduced into the Senate by the distinguished Senator from Iowa (Mr. Cummins) it did not contain the provision which has since become generally known as "section 6," but is now section 422 of the pending bill, which in the bill as it passed the Senate provided that the commission should so adjust and fix the rates to be charged by the railroad as to produce a return of 6 per cent net upon the value of the property of all the railroads in the United States, the value to be ascertained and fixed by the commission. However, when the railroad bill was finally reported to the Senate from the Senate Committee on Interstate Commerce it contained this section 6, and it was included in the measure as it passed the Senate in December; and this section, and the guaranty provisions which it contained, constituted one of the great stumbling blocks over which the House and Senate conferees labored for many weeks.

During the long hearings held by the House committee on this legislation, covering a period of more than two months and a half, when the proponents of this guaranteed return appeared and urged its inclusion in the House bill, it received scant consideration, in spite of the able counsel who were employed to urge it upon the committee. I am sure my distinguished friend from Wisconsin, the chairman of the committee (Mr. Esch), will not contradict that statement. It was given so little serious consideration that it was not proposed by anyone in the committee, and it is doubtful whether it would have received a vote if it had been proposed.

But there has been in existence during all the consideration of this legislation an organization whose sole object has been to foist this proposal upon the American people. While the people of the Nation have been bending their energies to solve the great problems which have come to the surface as a result of the World War, while they have their minds on other things, this organization has camped on the

doorsteps of Congress, engaging in and directing the most powerful propaganda ever undertaken in behalf of private interests, and as a result of their activities we find in this measure what I consider the most vicious and insidious departure from established principles of equality and justice ever sanctioned by a legislative body. This poverty-stricken organization has maintained in the National Capital for more than a year luxuriously appointed quarters, with high-salaried agents constantly on hand to urge that legislative safeguards be afforded to them which no other class of industry or investment has ever received or requested.

In order that we may understand just what this provision does for the railroads and to the people, let me state it in a few sentences. It directs the commission to "initiate, modify, establish, or adjust" rates so that carriers as a whole will earn an aggregate annual net income equal to a "fair" return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation; and then follows a provision which declares that for the next two years this "fair" return shall be fixed at 5½ per cent plus an additional one-half of 1 per cent for betterments and improvements, which makes a total of 6 per cent net that the bill instructs the commission to produce on the aggregate value of all the property of all the railroads in the country. It then provides that if any road shall make more than 6 per cent under the rates fixed by the commission one-half of the excess shall be set apart in the fund to be used by the roads in making improvements and betterments chargeable to capital account, and the other one-half shall be paid to the Interstate Commerce Commission for the creation of a "revolving" fund to be used in making loans to other railroads or in purchasing equipment, such as cars, engines, and other equipment to be leased to them.

Those who have urged this proposition upon Congress have set up the claim that it is necessary to do it because the Interstate Commerce Commission has

not treated the railroads fairly in the past in fixing rates. They claim that this thing must be done in order that capital may be induced to invest in railroad securities, in order that new capital may be brought into the railroad industry, in order that there may be larger extensions of railroad lines and railroad facilities in the United States. In other words, they tell us that in order that credit may be restored to the railroads of the country it is necessary for Congress by legislative enactment to put stilts under them and inject into their stocks values to which they are not entitled under normal conditions.

Let us examine the administration of the law which has existed for more than a quarter of a century. Let us look briefly into the history of railroading, the history of dividends, the history of the growth of American railroads in order to determine whether this indictment against the Interstate Commerce Commission is just or well founded. And in that connection I hope the Members of this House will not forget that the enactment of this measure in its present form is a legislative confirmation of all the charges and assertions which have been made against the commission by certain railroads which have for years been clamoring against it. It is a legislative indictment of the policy of the commission which has been upheld by the Supreme Court in scores of cases which they have decided. It is a legislative approval of all the anathemas which have been hurled at the commission by the railroad security holders who have demanded that, whatever else may happen, their dividends must be vouchsafed and guaranteed to them.

I maintain that this unprecedented, un-American, and unwholesome departure from the true functions of legislation is unnecessary, and in support of that assertion I summon the statements and records of the railroads themselves on file under oath before the Interstate Commerce Commission.

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I can not, Mr. Speaker, support a measure which compels the people of the Nation to pay tribute to inefficiency and extravagance, in order that railroads that do not deserve 6 per cent or any other fixed or established per cent shall receive that return, and in order that the ordinary hazards of business and investment shall disappear through the magic touch of legislation. I can not support a measure which insures one class against failure by levying tribute upon others not similarly protected.

But in order to give this proposal a semblance of propriety, it is provided that if any railroad in the United States shall make more than 6 per cent, upon rates which have been declared to be legal, just, and reasonable, one-half of that excess shall be taken from it and used to create a fund to be loaned to other roads, or used to purchase equipment to be leased to them. In other words, after the commission has fixed rates that under the law are presumed to be just and reasonable, if any railroad, by honesty, efficiency, economy, and good management, should make more than 6 per cent, it is to be penalized by taking from it one-half of the excess above 6 per cent for the benefit of other roads which may not have been so efficiently, economically, or honestly managed, or which in the nature of things could not keep pace with their competitors.

I can not rid myself of the deep conviction that this is an unprecedented, if not vicious, departure from the legislative history of this Nation, for never before have we gone so far as to penalize economy and efficiency in order that the opposite qualities might receive more than their share of the rewards of honest effort. And if this policy shall be adopted with respect to the railroads, is there any reason in logic why it ought not to be adopted or why it may not be demanded with respect to other business in the United States?

The Constitution confers upon Congress the power to regulate commerce among the several States and with foreign countries. Under the decisions of the

Supreme Court and the practices of the commission and other bodies from time to time established by Congress, this power has developed into the regulation not only of commerce itself but also of the instrumentalities of commerce, which includes the railroads. Therefore, if it is wise and proper, if it is in accordance with the theories and principles of our Government, that Congress shall not merely regulate commerce but shall regulate the earnings of commerce, why shall we not be compelled to follow this policy in logical sequence in the future and regulate the earnings of individuals and corporations which ship commerce over the railroads or produce things that enter into commerce? If we are to embark upon the policy of taking away from prosperous and successful railroads in order to give to unsuccessful or poorly managed railroads, why is it not just as righteous and as fair to take away from prosperous corporations or individuals a part of their earnings in order that it may be given to the improvident and the shiftless?

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Let us see how this legislation will operate to do violence to that solemn constitutional safeguard to the rights of property. In order that this average of 6 per cent net may be guaranteed to all the railroads it will be admittedly necessary for those who live along or patronize well-managed, successful, and honest roads to pay more than the service they receive is worth, more than the roads themselves may ask for or need, in order that a fund may be created which is to be used for the benefit of others. Therefore, if these well-managed and successful roads, under lawful rates which must in theory at least be "just and reasonable," are able by the exercise of economy and prudent business management to earn more than 6 per cent net, under the law and under the guaranties provided in the Constitution it belongs to them. If the rate is lawful, if it is approved by the commission as just and reasonable, they are entitled to earn all they can under that

rate, and they are entitled to keep it as their reward for efficiency and economy.

We have no constitutional right to take away from them what they have saved honestly through efficient management in order to bolster up the credit of weak, mismanaged, or inefficient railroads. And if, upon the theory that a particular road is earning more than it is entitled to, we have a right to take away a part of its earnings, certainly we have no right, in the first place, to take it away from the people who pay it. For if a railroad earns more than it is entitled to earn or retain it is because it is permitted or compelled to collect from the people an unreasonable rate which results in the excess, and if the people are paying an unreasonable rate to one road in order that some other road somewhere else may be helped, we are taking away from them a part of their property without due process of law and without compensation. This, in my opinion, renders the law doubly unconstitutional. If the rates which the railroads collect are lawful rates, are just and reasonable for the service rendered, the roads are entitled to the earnings they may be able to realize from them. If they collect, even with the permission of the commission or under its compulsion, rates which are more than reasonable, and therefore unreasonable and unlawful, the excess belongs to the people, and they are entitled to retain what is theirs until it is taken away from them in the manner prescribed by the Constitution. And if this provision for taking a part of the excess shall be declared unconstitutional, and many roads are allowed or compelled to collect rates higher than they are entitled to, the result will be the taking from the people of hundreds of millions of dollars in excessive freight rates without even receiving an indirect benefit from the excess payment. There would in that event be no provision for the recapture of any of the excess or for its return to those who had paid it.

Now, let us see about the question of the valuation of the railroads upon which this 6 per cent net return

is to be based. In 1913, seven years ago, Congress passed an act providing for the physical valuation of the railroads of the country. Up to the present time only five or six of them have been valued, and those five or six are contesting the valuation placed upon them by the Interstate Commerce Commission. It is admitted by everybody who knows anything about it that the valuation of the railroads of the whole country can not be completed within the next two years. Therefore during that two years we can not know with any degree of accuracy what the total value of the railroads is upon which we proposed to fix this net return of 6 per cent. I received in my mail to-day a letter from Mr. Samuel Rea, president of the Pennsylvania Railroad Co., inclosing a speech which he had made somewhere asserting that the total value of the railroads of the United States amounts to more than $24,000,000,000. Under the Interstate Commerce Commission's reports their total capital is a little more than $19,000,000,000 and their total investment a little more than $18,000,000,000. Others whose opinions are entitled to consideration contend that their real value is much less than either figure given above. Whose estimate is to be taken? Whose figures are to be used as the basis upon which this tribute from the American people is to be required? It may be said that the commission shall fix its own value. But what will be its standard of valuation in the absence of the completed valuation provided for in the valuation act? Will its valuation be what it would require to reproduce the property at present prices? Or would its standard be the price the property would bring at a fair voluntary sale? Or shall the valuation be based upon earning capacity? All these standards may result in different amounts and a combination of the three in still different figures.

The absurdity of fastening upon the country a rate structure which is designed to guarantee 6 per cent net upon a valuation that can only be guessed at is so obvious that it is almost inconceivable that

Congress would seriously consider it. And the absurdity increases when we realize that this standard of return will be a permanent standard, for, notwithstanding the bill provides that after the two years shall expire, after the rate structure has been set and ordained to produce 6 per cent, the commission may establish a different standard of what is a "fair" return, we know it will not be reduced, because the congressional sanction of 6 per cent as a minimum will be powerfully persuasive to operate against any reduction that might be possible. Therefore we are by this legislation compelling the commission to guarantee to the roads 6 per cent upon the value of their property when they themselves do not know what that value is.

Representative Griffin (New York, February 21, 1920) said (Cong. Rec. Vol. 59, Pt. 4, p. 3286):

If this bill becomes a law it will most assuredly accentuate and redouble the demand for Government ownership. The people will soon grow tired of seeing special interests specially favored and taxpayers in general will begin to ask why taxes are collected out of their hard-earned income to be set aside in revolving funds to loan to railroad corporations. Already the farmers are up in arms. The Corn Belt Meat Producers' Association, the Farmers' Grain Dealers' Association of Minnesota, and the Illinois Farmers' Grain Dealers' Association have passed the following ironical but very significant resolutions:

"*Resolved*, That we ask our representatives in Congress to immediately enact legislation dividing the country into farm zones or districts, and guaranteeing to the farmers, in the aggregate, in each zone or district for a period of two years from the effective date of the legislation a net return of 5½ per cent profit, plus ½ per cent for new fences and barns; and that the said total of 6 per cent shall be above all taxes and above all cost of labor and supplies; and it shall be computed on the present cost of reproduction of the

farms in said zones or districts in their present condition: Further be it

"*Resolved*, That as an incident to the foregoing guaranty, that Congress shall also be requested to guarantee (1) that we won't have a drought this summer, (2) that our sows will bring forth of their kind bountifully and plentifully, and (3) that our eggs will hatch, our hens will cackle, and our roosters will crow."

* * * * *

A continuance of Government control can not in any way injure the prosperity of the Nation. On the other hand, the passage of this measure at this particular time will further increase the cost of living, for when you raise freight rates from 25 to 40 per cent you add at least one billion to the charges paid by shippers and several billions in added costs to the public at large. At this period of our country's history our paramount duty is to reduce the cost of living, not to increase it; to allay the existing unrest, not to stimulate it; to zealously guard extravagance, not to throw open the doors of the people's Treasury, guaranteeing the earnings of a select class. If this bill becomes a law, it will be listed, in my estimation, as one of the greatest blunders in the history of the American Congress.

* * * * *

The proponents of this legislation would have us believe that the farmers are in favor of it, but this letter will refute that statement:

GENTLEMEN OF THE CONGRESS: On behalf of the 750,000 members of the farmers' organizations united in the Farmers' National Council to carry out their reconstruction program, I most earnestly request you to defeat the pending conference railroad bill.

Nearly every national farm organization of any size, regardless of its position on the return of the railroads, has opposed the Government guarantee of dividends or Government subsidy, which is specifically provided in section 15a (3) of this railroad bill,

wherein the Interstate Commerce Commission is instructed to fix rates which will yield 5½ per cent on the aggregate value of the railroads and permitted to add not to exceed one-half of 1 per cent of such aggregate value.

May I repeat that the overwhelming majority of the organized farmers of America, and, in my judgment, of the unorganized farmers, are opposed to the return of the roads under the pending bill, and I express the hope that you will oppose such legislation and work for the two-year extension of Government operation, so that a plan fair to all the interests involved may be worked out for the final disposal of the railroads.

Yours sincerely,

THE FARMERS' NATIONAL COUNCIL.
GEORGE P. HAMPTON,
Managing Director.

FEBRUARY 20, 1920.

Representative Evans (Montana), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 9, p. 8874):

My particular objection and complaint to the bill is that it is in effect a guaranty of 5½ to 6 per cent upon the investment of these properties. In order that we may understand just what this provision does for the railroads and to the people, let me state it in a few sentences. It directs the commission to "initiate, modify, establish, or adjust" rates so that carriers, as a whole, will earn an aggregate annual net income equal to a "fair" return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation, and then follows a provision which declares that for the next two years this "fair" return shall be fixed at 5½ per cent plus an additional one-half of 1 per cent for betterments and improvements, which makes a total of 6 per cent net that the bill instructs the commission to produce on the aggregate value of all the property of all the railroads in the country. It then provides that if any

road shall make more than 6 per cent under the rates fixed by the commission, one-half of the excess shall be set apart in a fund to be used by the roads in making improvements and betterments chargeable to capital account and the other one-half shall be paid to the Interstate Commerce Commission for the creation of a "revolving" fund to be used in making loans to other railroads or in purchasing equipment, such as cars, engines, and other equipment to be leased to them.

If this provision of the bill goes into effect, the Congress puts its stamp of approval on improvidence, negligence, and inefficiency. There will no longer be a reward for energy, initiative, frugality, and efficiency. I can not support a measure which compels the people of the Nation to pay tribute to inefficiency and extravagance in order that those who do not deserve it may get 6 per cent or any other established return. I can not bring myself to believe that any measure that insures one class of our people against failure in business by levying tribute on another class is good legislation.

This bill provides that if any railroad shall make more than 6 per cent on rates which have been declared to be legal, just, and reasonable, one-half of the excess of said 6 per cent shall be taken from it and used to create a fund to be used for the benefit of other roads. In other words, when the Interstate Commerce Commission has fixed a rate that under the law is just and reasonable, and any road through honesty, energy, and economy and efficiency and good management makes more than 6 per cent, it is to be penalized because of its honesty, efficiency, and good management, and one-half of the said excess is to be turned over to those roads whose management is negligent, inefficient, and possibly dishonest, or are for some other reason a financial failure. Such legislation is a departure from all the precedents of the Government.

Representative Denison (Illinois), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3297):

There is no valid reason why a fair return of capital invested in the railroads in the different rate-making districts of the country should be exactly the same or that it should be exactly the same from year to year. Investments of private capital in other industries or other securities do not yield the same returns in different parts of the country or in different years. People invest their capital in railroad securities just as they do in other industries with full knowledge of the conditions of the business, with the chance of loss and the hope of large returns before them. It is a mistake for the Government to single out investments of private capital in railroads from all other industries of the country and by legislation guarantee a fixed return on such investments without regard to any of the conditions which under natural economic laws determine the returns on all other investments. It is not only unwise but it is dangerous legislation. If we guarantee a fixed return on railroad investments for two years we will thereby blaze the trail and set the precedent for similar legislation by those that follow us. We will later be asked to do so for the years to come, and who knows but that we may be asked to do the same for investments of private capital in telephone and telegraph companies and other public utilities, in coal mines, and other industries that are essential to public welfare.

The excuse for a legislative guaranty of income on such other investments may not now be as apparent as for investments in the railroads, but the principle involved is the same. It is paternalism pure and simple. A Congress might be elected that would think 7 per cent a fair return, or public sentiment might change and a Congress be elected that would think 2 per cent a fair return on railroad investments and legislation might be enacted guaranteeing that return. Congress should never attempt by legislation to even up and equalize the incomes arising

from investments of private capital. Some investments in railroads have been wise and some unwise. Some railroads have been managed wisely and some unwisely. Some have been fortunate and others unfortunate because of natural conditions. Some have been honestly managed and some dishonestly managed. It is, I think, an unwise and dangerous policy for the Government to undertake by legislation to level up such investments by guaranteeing a fixed return. It is the first step toward socialism, and I am opposed to taking the first step in that direction.

Representative Ayres (Kansas), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 9, p. 8868):

It has been stated, and so far it has not been denied, that this guaranty feature of section 422 of this bill was conceived and prepared by a prominent railroad president, Mr. Warfield, who is also chairman of an association of holders of railroad securities said to represent 90 per cent of the total amount of securities in the United States. If this is not true, let some one in authority deny it. There is no denying the fact that there has been a wonderful and powerful organization here in Washington directing and managing a propaganda in behalf of the railroad interests, and it has succeeded in getting through the most pernicious and vicious measure that was, to my mind, ever enacted.

I wonder what this Congress would do if the farmers and stockmen of the country would come here and demand we pass a law guaranteeing them against d ough or an epidemic; or that we guarantee them a 5½ per cent return on the aggregate value of their properties; or that we divide them into regions and prov de all who make a return of over 6 per cent must put one-half the excess in the pot to be loaned to or buy equipment, machinery, and stock for some fellow who never did make a living on his farm, and never would?

Oh, but some will say, "This is pure demagogy." Well, let us see if it is. We know that when the war came many railroads had practically ceased to function and within 60 days from the time they were taken over would have been in the hands of receivers. Their managers or operators confessed their inability to stem the tide. This condition was brought about in many instances by the exploitation of the roads. But it matters not the cause, at that time when the Nation needed every avenue and means of transportation in its struggle for life and existence, that which should have been its main support was a dismal failure, which was a disgrace to the management of the Nation's greatest enterprise. There was but one horn of the dilemma for the Government to take. It had to act and act at once. It took over the control of this great transportation system. It had to retain for its management those familiar with its working. To have done otherwise meant disaster.

Representative Mason (Illinois), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 9, p. 8856):

Mr. Speaker, after years of legislative experience in both branches of the legislature of my State and both branches of Congress, I have learned to respect the opinions of my associates. I have seen appalling legislative actions taken, sometimes by "whip and spur" through brilliant leadership, sometimes by the artifice of quick action without fair debate, and sometimes by the clever insertion of the legislative joker. There is a large majority of this House and the Senate that will vote for this bill; but I give it as my solemn judgment that if either the Esch or Cummins bill had 30 days ago proposed a change in the law that gives the railroad companies "fair and reasonable rates," which has been the law for more than a quarter of a century, so that the law would read that the companies should be allowed to charge all expense and then be guaranteed 5½ and 6 per cent on the value of the property which they own, there would have been such a protest from our constituents

that not a single man in either Chamber would have voted for that proposition.

Representative Sanders (Louisiana), February 21, 1920, said (Cong. Rec. Vol. 59, Pt. 4, p. 3303):

The provision of section 422, constituting, as it does, a governmental guaranty of dividends upon private investment, is economically unwise, politically unheard of heretofore, and un-American in that it violates the principle of special privileges to none.

○

SUBJECT INDEX.

66329—23——1

TABLE OF CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

DAYTON-GOOSE CREEK RAILWAY COMPANY *v.* THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.	In Equity, No. 330.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is an appeal from a final decree of the District Court of the United States for the Eastern District of Texas at Beaumont, sustaining a motion to dismiss filed by the United States, appellee, and dismissing the petition. The appellant here was the complainant in the lower court.

Section 422 of the transportation act, 1920, approved February 28, 1920, amended the interstate commerce act by inserting therein a new section, designated section 15a, and pursuant to the authority conferred and the duties imposed upon it by the latter section the Commission issued orders dated,

respectively, January 16 and March 16, 1922, which are in words and figures as follows, namely:

INTERSTATE COMMERCE COMMISSION,
WASHINGTON.

ORDER.

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 16th day of January, A. D. 1922.

In the matter of the recovery and payment of excess railway operating income under the provisions of section 15a of the interstate commerce act.

The Commission having under consideration the provisions of paragraphs (6) and (9) of section 15a of the interstate commerce act, reading as follows:

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof, shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purpose of this paragraph the value of the railway

property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided for in paragraph (4).

(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of the year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

It is ordered:

(1) That the years or parts of years for which net railway operating income and the return represented by such income upon the aggregate value of railway property held for and used in the service of transportation are to be computed shall be the years or parts of

years ending on December 31, respectively. In the case of any carrier which accepted the provisions of section 209 of the transportation act, 1920, the first period for which such computations are to be made shall be September 1, 1920, to December 31, 1920, both inclusive. In the case of carriers which did not accept the provisions of said section 209 of the transportation act, 1920, the first period for which such computations are to be made shall be March 1, 1920, to December 31, 1920, both inclusive.

(2) That the excess income for the portions of a year ended December 31, 1920, shall be preliminarily fixed as the income in excess of such proportions of 6 per cent on the value of the railway property held for and used in the service of transportation as the net railway operating income for the months of September to December, both inclusive, or for the months of March to December, both inclusive, as the case may be, in the three years ended June 30, 1917, bears to the total net railway operating income for the same three years.

(3) The aggregate value of the railway property of the reporting carrier or carriers held for and used in the service of transportation shall be based preliminarily, in the case of carriers which made such returns directly or indirectly, upon the amount reported or used by such carrier or carriers as the aggregate value of railway property held for and used by them in the service of transportation in the proceeding entitled "in the matter of the applications of carriers in official, southern and western classi-

fication territories for authority to increase rates," Docket No. Ex Parte 74, with adjustments for—

(*a*) New lines, extensions and additions, and betterments;

(*b*) Retirements;

(*c*) Amounts of property for which permission to retain earnings under paragraph (18) of section 15a of the interstate commerce act has been granted; and

(*d*) Other increases or decreases, properly affecting the aggregate value of the railway property of such carriers held for and used in the service of transportation, claimed or reported by the carrier and supported by detailed explanations. The value of such railway property, as reported, will be corrected and the actual value will be determined in the manner provided in paragraph (4) of section 15a of the interstate commerce act, and corresponding adjustment in amounts recoverable by and payable to the Commission will be effected. In the case of those carriers which did not directly or indirectly make returns in connection with Ex Parte 74, the investment in road and equipment as of December 31, 1919, with proper adjustments as herein above indicated will be used for preliminary computations, and these preliminary computations will be similarly corrected after the determination of actual values in accordance with paragraph (4) of section 15a of the interstate commerce act.

(4) The establishment of preliminary bases for prorating the return of 6 per cent, or

ascertaining property values to which the rate is applicable, does not preclude any carrier from using such other bases as it considers more equitable and in accord with the facts; such other bases, however, must be fully and properly supported.

It is further ordered, That pursuant to the foregoing rules and regulations for the determination and recovery of the excess income payable under section 15a of the interstate commerce act each and every carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the provisions of the interstate commerce act, excluding—

(*a*) Sleeping car companies and express companies;

(*b*) Street or suburban electric railways unless operated as a part of a general steam railroad system of transportation;

(*c*) Interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight; and

(*d*) Any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated and controlled by any State or political subdivision thereof, shall on or before February 1, 1922, report to the secretary of the Interstate Commerce Commission, Washington, D. C., the following matters:

1. The amount by which its net railway operating income for the period ending De-

cember 31, 1920, was in excess of that percentage of the value of railway property held for and used by it in the service of transportation, established by the foregoing rules, with explanation and details of the manner in which such excess income was computed, or, in the event there was no such excess railway operating income, that fact, with corresponding calculations and details in support of the return.

2. In cases where excess net railway operating income is reported, a statement of the title of the fund account in which one-half of such excess was placed, when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held.

3. The amount of the remaining one-half of the excess income as preliminarily computed paid to the Interstate Commerce Commission and when and how such amount was paid. If unpaid the amount should be paid by remittance to or draft in favor of the Interstate Commerce Commission, transmitted to George B. McGinty, secretary of the Interstate Commerce Commission, Washington, D. C.

4. The value of the railway property of the reporting carrier or carriers with a statement in detail of the manner in which such value is arrived at and a full explanation as to the method in which the values of properties of a group of carriers have been aggregated in cases where property values and income are

computed for a system pursuant to the provisions of paragraph (6) of section 15a of the interstate commerce act. In such cases a full explanation should be given of the reasons why the group of carriers used are treated as under common control, management, and operation.

It is further ordered, That an original report and three copies of the same shall be forwarded to George B. McGinty, secretary, Interstate Commerce Commission, Washington, D. C. Reports shall be prepared in typewritten or printed form, on paper approximately 8½ by 11 inches, with 1½ inches margin at the left side for binding, except as to exhibits, which may be of any convenient size, but which shall be folded to conform to the size of the report.

It is further ordered, That the original reports shall be made under oath signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

By the Commission, Division 4:

[SEAL.] GEORGE B. MCGINTY,
Secretary.

(Rec. 19–22.)

INTERSTATE COMMERCE COMMISSION,
WASHINGTON.

ORDER.

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 16th day of March, A. D. 1922.

In the matter of the recovery and payment of excess railway operating income under the provisions of section 15a of the interstate commerce act for the year ended December 31, 1921.

The Commission having under consideration the provisions of paragraph (6) of section 15a of the interstate commerce act, reading as follows:

(Language of said paragraph (6), included in order, omitted here.)

It is ordered, That pursuant to the rules and regulations for the determination and recovery of the excess income payable under section 15a of the interstate commerce act, as defined in our order of January 16, 1922, modified as may be necessary in the case of each respondent for the year ended December 31, 1921, each and every carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to the provisions of the interstate commerce act, excluding—

(*a*) Sleeping car companies and express companies;

(*b*) Street or suburban electric railways unless operated as a part of a general steam railroad system of transportation;

(*c*) Interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight; and

(*d*) Any belt line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof, shall on or before May 1, 1922, report to the secretary of the Interstate Commerce Commission, Washington, D. C., the following matters:

1. The amount by which its net railway operating income as defined in paragraph (1) of section 15a of the interstate commerce act, for the year ended December 31, 1921, was in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, with explanation and details of the manner in which such excess income was computed, or in the event there was no such railway operating income, that fact, with corresponding calculations and details in support of the return.

2. Where it reports excess net railway operating income, the title of the fund account in which one-half of such excess was placed, the date when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held, and the amount of the remaining one-half of the excess income, as preliminarily computed, paid to the Interstate Commerce Commission and when and how such amount was paid. If the latter amount is unpaid, it should be paid by

remittance to or draft in favor of the Interstate Commerce Commission, transmitted to George B. McGinty, secretary of the Interstate Commerce Commission, Washington, D. C.

3. The value of such railway property used in earning the income reported for the year ended December 31, 1921, with a statement in detail of the manner in which such value is arrived at and showing the ownership and a general description of such railway property.

4. The foregoing requirements of this order are made subject to the following proviso, that in cases where two or more of said carriers constitute a group under common control and management and operated as a single system, as provided in paragraph (6) above quoted, the foregoing matters shall be reported for the system as a whole, irrespective of the separate ownership and accounting returns of the various parts of such system, but shall also be reported in so far as practicable for each part of the system, and full explanation shall be made as to the method in which the values of properties of a group of carriers have been aggregated and the reasons why the group of carriers used are treated as under common control, management, and operation.

It is further ordered, that an original report and three copies of the same shall be forwarded to George B. McGinty, secretary, Interstate Commerce Commission, Washington, D. C. Reports shall be prepared in typewritten or printed form, on paper approximately 8½ by 11 inches, with 1½ inches margin at the left side for binding, except as to exhibits, which

may be of any convenient size, but which shall be folded to conform to the size of the report.

It is further ordered, that the original reports shall be made under oath signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

By the Commission, Division 4:

[SEAL.] GEORGE B. MCGINTY,

(Rec. 22–24.) *Secretary.*

In response to said orders appellant sent to the office of the Commission, under protest, two reports, one showing that, for the 10 months ended December 31, 1920, the amount of appellant's excess net railway operating income was $21,666.24, and the other showing that for the year ended December 31, 1921, the amount of appellant's excess net railway operating income was $33,766.99.

Thereafter, on or about December 6, 1922, appellant filed in the lower court its petition herein, in which, among other things, it alleged:

> That the provisions of section 15a of the interstate commerce act relative to the payment of so-called excess income to the Commission, and relative to the etablishment and maintenance of the so-called reserve fund therein referred to, and the construction placed thereon by the defendants herein, and the administrative acts of the Commission in pursuance thereof, and the said orders and demands of the Commission in respect thereto,

> are each and all, as to complainant, null and void and wholly invalid, for that the same, and each of them, are in contravention of the fifth amendment to the Constitution of the United States, * * *. (Rec. 7.)

Appellant also alleged that said provisions of section 15a are in conflict with the tenth amendment to the Constitution of the United States.

The Commission filed an answer in which, among other things, it denied each of and all the allegations above mentioned, and also denied that said orders *require*, or that either of them *requires*, appellant to pay into a reserve fund, or to the Commission, sums of money as alleged in the petition, or any other sum or sums of money.

The prayer of the petition reads as follows:

> (*a*) That a proper court be assembled, to which this petition and application may be presented and submitted;
>
> (*b*) That on due notice to the defendants and to the Attorney General of the United States, and after hearing of this petition and application, this Court may issue its writ or process, temporarily staying and suspending the said orders of the Commission and each of them, so far as they relate to the payment of money to the Commission and into said reserve fund, and enjoining defendants and each of them from instituting or prosecuting any civil or criminal suit or suits against complainant or any of its officers or directors, or either of them, jointly or severally, until complainant can present to the court, on a day to

be fixed in said order, this its petition and application for an interlocutory injunction against the enforcement of said orders in the respects aforesaid;

(*c*) That after hearing, to be likewise held after due notice to the defendants and the Attorney General, there may issue out and under the seal of this Honorable Court a writ of temporary or interlocutory injunction, directed against the defendants, enjoining, restraining and suspending until the entry of the final decree the enforcement of said orders, and each of them, and the prosecution of complainant or its officers or directors, jointly or severally, in the respects mentioned in this prayer;

(*d*) That on final hearing this court enter its order perpetually suspending, vacating annulling and avoiding said orders of the Commission, and each of the same, as to complainant, and perpetually enjoining and restraining the enforcement of said orders, and each of them, in all respects, and each and every attempt thereat; and,

(*e*) For all such other and further relief, at law or in equity, special or general, as complainant, by virtue of the premises may be entitled to receive; and as in duty bound complainant will ever pray.

(*f*) Complainant further prays for service of subpœna and process upon the Commission, which service may be made on George B. McGinty, secretary of said Commission; and for service of subpœna upon the United States, which service may be made by filing a copy

of this petition in the office of the Secretary of the Interstate Commerce Commission and with the Attorney General of the United States in the Department of Justice; and service of subpœna upon Randolph Bryant, United States District Attorney for the Eastern District of Texas, which service may be made upon him in person, in Grayson County, Texas, the county in which he resides, or in Jefferson County, Texas, where he is temporarily sojourning and may be found. (Rec. 17–18.)

Appellant's assignments of error are twenty-eight in number, and appear to us to be covered, in substance, by the points included in the subject index of this brief.

ARGUMENT.

I.

THE ORDERS OF JANUARY 16 AND MARCH 16, 1922, WERE MADE BY THE COMMISSION AS A PROCEDURAL STEP DEEMED BY IT NECESSARY AND APPROPRIATE FOR THE PURPOSE OF ENFORCING, IN SO FAR AS WITH IT LIES, THE PROVISIONS OF SECTION 15a OF THE INTERSTATE COMMERCE ACT, BUT DO NOT, IN AND OF THEMSELVES, REQUIRE APPELLANT TO PAY INTO A RESERVE FUND OR TO THE COMMISSION ANY SUM OR SUMS OF MONEY.

The allegations contained in the petition manifest a disposition on the part of appellant to treat the orders of the Commission as *requirements* that appellant pay into a reserve fund and to the Commission, in equal proportions, the sums of money shown in the reports made to the Commission by appellant under protest, as net railway operating income received by appellant in excess of the income

of 6 per centum mentioned in paragraph (6) of section 15a, during the periods covered by the orders, respectively, but the language used in the orders does not justify such an interpretation. The language used in this connection is the same, in substance, in both orders, and pertinent words and figures contained in the order of January 16 are:

> * * * shall * * * report to the secretary of the Interstate Commerce Commission, Washington, D. C., the following matters:
>
> * * * * *
>
> 2. In cases where excess net railway operating income is reported, a statement of the title of the fund account in which one-half of such excess was placed, when such reserve fund was established, the amount placed in that fund, and how the assets in that fund are represented or held.
>
> 3. The amount of the remaining one-half of the excess income as preliminarily computed paid to the Interstate Commerce Commission and when and how such amount was paid. If unpaid the amount should be paid by remittance to or draft in favor of the Interstate Commerce Commission, transmitted to George B. McGinty, secretary of the Interstate Commerce Commission, Washington, D. C. (Rec. 21–22.)

It will be observed that, in connection with the reserve fund, the Commission confined itself to requiring appellant to report: The title of the fund; the date of its establishment; the amount of money

credited to it as excess net railway operating income, and an explanation of how the assets in the fund are represented or held.

It will also be observed that, in connection with payment to the Commission, appellant was simply required to report the time and manner of payment, if at the date of the report payment had in fact been made. However, the Commission stated that if the payment had not been made it *should* be made.

In other words, the orders, in so far as they relate to payments to the Commission, and placing in reserve funds, of excess income, are simply admonitory and intended to remind appellant of the requirements of paragraph (6) of said section 15a, which, as above shown, are:

> If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof, shall, within the first four months following the close of the period for which such computation is made be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described.

II.

THE REQUIREMENTS CONTAINED IN THE ORDERS ARE FULLY SUPPORTED BY THE AUTHORITY CONFERRED UPON THE COMMISSION BY SAID ACT, AND ARE IN ACCORDANCE WITH THE DUTIES IMPOSED UPON THE COMMISSION BY PARAGRAPH (9) OF SAID SECTION 15a.

It will be seen that the requirements contained in the orders are confined to rules and regulations prescribed by the Commission for the guidance of appellant and other common carriers in preparing and sending to the office of the Commission reports pertaining to excess net railway operating income.

Authority to call for such reports is conferred upon the Commission by paragraphs (1) and (2) of section 20 of said act. In this connection we quote from the latter paragraph as follows:

> * * * The Commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or by any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires; * * *.

And an examination of paragraph (9) of section 15a, above set forth, will disclose that the Commission is both authorized and required by that paragraph to prescribe the rules and regulations contained in the orders.

III.

APPELLANT IS NOT REQUIRED BY EITHER THE PROVISIONS OF SECTION 15a OR THE ORDERS OF THE COMMISSION TO INCLUDE INCOME ARISING FROM NONCARRIER SOURCES IN EXCESS NET RAILWAY OPERATING INCOME.

In paragraph (1) of section 15a it is provided that—

> * * * "net railway operating income" means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

The reports made to the Commission by appellant, copies of which are Exhibits "C" and "D" to the petition, show that in computing its railway operating income the only items included by appellant were: Railway operating revenues; railway operating expenses; railway tax accruals; and uncollectible railway revenues, except that the latter item is not shown in Exhibit "C." (Rec. 24–33.)

In paragraphs 7 and 8 of the petition appellant alleges that the reports mentioned were made by it in pursuance of the Commission's orders. (Rec. 5.)

For the reasons above set forth we think it is clear that appellant is not required by either the provisions of section 15a or the orders of the Commission to include income derived from noncarrier sources in excess net railway operating income.

Although appellant's petition contains a contention contrary to what has been said by us under this heading (Rec. 8–9), we do not find a corresponding contention in the assignments of error, and under-

stand the contention was abandoned by appellant upon the oral argument at New Orleans in the lower court.

IV.

IN THE PROCEEDING KNOWN AS EX PARTE 74 THE COMMISSION DID NOT FIX THE RATES, FARES, AND CHARGES FOR THE TRANSPORTATION OF PASSENGERS AND PROPERTY BY RAILROAD IN THE GROUP IN WHICH APPELLANT'S RAILROAD IS LOCATED.

In connection with the subject matter of the above heading, we quote from subdivision (*a*) of paragraph 13 of the petition as follows:

> The Commission, acting upon the authority and direction of Congress as set forth in the transportation act, 1920, and in pursuance of the duties imposed upon it in that respect, in a proceeding known upon the docket of the Commission as ex parte 74, undertook to and did divide the railroads of the United States into groups, and fixed such rates, fares, tolls, and charges for each group as in its judgment and opinion would produce the fair return upon the value of the property devoted to public uses for common carrier purposes, as provided for in said act; and complainant avers that the rates so fixed by said Commission for the group comprising the territory in which complainant is located proved to be wholly and utterly inadequate, and too low to afford, produce or raise the net revenue upon property devoted to carrier purposes as contemplated and provided for in the aforesaid act; * * *. (Rec. 10-11.)

The report and order of the Commission in the proceeding referred to are dated July 29, 1920. The report will be found in 58 I. C. C. at page 220 et seq., and the full text of the order is:

> At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 29th day of July, A. D. 1920.
>
> Ex Parte 74.
>
> In the Matter of the Applications of Carriers in Official, Southern and Western Classification Territories for Authority to Increase Rates.
>
> *It appearing*, That by its report entered in the above-entitled proceeding, which is hereby referred to and made a part hereof, the Commission authorized certain increases in the rates, fares, and charges of railroads within the continental United States;
>
> *It is ordered*, That all outstanding unexpired orders of the Commission, whether or not effective upon the date of this order, authorizing or prescribing rates, fares, and charges which have or have not been published at the date of this order, and all outstanding suspension orders, be, and they are hereby, modified to the extent necessary to permit the increases herein authorized to be applied to the rates, fares, and charges authorized or prescribed in or maintained or held by virtue of said outstanding orders; but that in all

other respects said orders shall remain in full force and effect.

It is further ordered, That all tariffs or supplements changing rates now maintained or held by virtue of outstanding orders of this Commission shall bear on their title-page the following:

"Rates shown in this supplement (or tariffs supplemented hereby) published under authority of outstanding orders of the Interstate Commerce Commission are increased herein under authority of order of the Interstate Commerce Commission in docket No. 74 (Ex parte), dated July 29, 1920."

And it is further ordered, That a copy of this order be served on each carrier party to said orders and that a copy thereof be inserted in the docket in each such proceeding. (Rec. 62.)

It thus appears that the rates, fares, tolls, and charges referred to by appellant, which resulted from applying and putting in force increases authorized by the Commission, were not fixed by the Commission, but were fixed instead by the interested common carriers. In this connection, the lower court in its opinion said:

> The carriers are not required to charge these rates; they are only permitted so to do, * * *. (Rec. 69.)

V.

THE MATTERS REFERRED TO IN SUBDIVISION (b) OF PARAGRAPH THIRTEEN OF THE PETITION DO NOT TEND TO SHOW EITHER THAT CERTAIN PROVISIONS OF SECTION 15a ARE UNCONSTITUTIONAL OR THAT THE ORDERS OF THE COMMISSION ARE INVALID.

The first paragraph of subdivision (*b*), above mentioned, reads:

> Notwithstanding that the reports aforesaid show for the periods aforesaid certain net earnings in the manner in which the reports reflect the truth as of the respective dates of said reports, in so far as correct answers to the questionnaire of the Commission are concerned, yet, nevertheless, said reports do not reflect the true facts as to property values devoted to carrier purposes, nor as to the total final net earnings of either period, but are subject to pending claims and to all such claims as may hereafter be presented against complainant for which complainant may be legally liable, including claims for alleged overcharges collected during each of said periods, for loss and damage to property, for injury to and death of persons, and for claims by shippers with respect to the reasonableness, justness or legality of the rates, fares and charges collected by or participated in during such respective periods by complainant. (Rec. 11.)

In so far as the foregoing quotation relates to changes which may be rendered necessary by changes in the value of appellant's property, appellant is fully protected by a provision contained in the order

of January 16, which is included by reference in the order of March 16. In this connection we quote from the former order, which is Exhibit "A" to the petition, as follows:

> * * * The value of such railway property as reported, will be corrected and the actual value will be determined in the manner provided in paragraph (4) of section 15a of the interstate commerce act, and corresponding adjustments in amounts recoverable by and payable to the Commission will be effected. * * *. (Rec. 20.)

And in so far as the quotation from said subdivision (b) relates to changes which may be rendered necessary in the future on account of payments appellant may be required to make in connection with claims which accrued during the periods covered by the orders, appellant is fully protected by special instructions contained in the Commission's "Classification of operating revenues and operating expenses of steam roads, issue of 1914, effective on July 1, 1914," from which we quote as follows:

> *Accounts for operating revenues.*—The accounts provided for operating revenues are designed to show amounts of money which a carrier becomes entitled to receive from transportation and from operations incident thereto.
>
> Credits to the revenue accounts shall as nearly as practicable be upon the basis of accruals of revenue.
>
> No charge shall be made against the accounts of this classification for amounts representing

tariff charges which for any cause are uncollected, the service for which the charge is made having been properly performed and individuals or companies being liable for the charges.

Accounts for operating expenses.—The accounts prescribed for operating expenses are designed to show expenses of furnishing transportation service, including the expenses of maintaining the plant used in the service. The accounting shall be as nearly as practicable upon the basis of accruals; however, the option is allowed the carrier of omitting charges to the accounts provided for the depreciation of fixed improvements and of including the depreciation (ledger value less salvage) of such property in the appropriate repair accounts at the time the property is converted or retired for replacement. (Rec. 62–63.)

That a carrier is authorized and expected to make adjustments in its accounts in one year because of payments made by it in connection with claims which may have accrued in a prior year is manifested by other provisions contained in said special instructions, among which are the following:

Balances in operating reserves.—If, at the end of a fiscal year, balances remain in operating reserves, the carrier shall indicate in detail in a formal report to the Commission the amounts therein, and the conditions causing the carrying forward of such balances, except as to balances applicable to personal injury or loss and damage liability, for which bal-

ances the carrier shall preserve in its files the details upon which such estimates were based. Separate records shall be kept of the operating reserve accounts for each year.

Interpretation of item lists.—Lists of "items," "details," etc., have been given as a part of this classification for the purpose of clearly indicating the application of the accounting rules in specific cases. The lists in every case are to be considered as merely representative and not as excluding from any account analogous items which happen to be omitted from the list appended. * * *. (Rec. 63.)

Unaudited items affecting operating accounts.—When for any cause the amount of any item affecting operating revenues or operating expenses can not be accurately determined in time for inclusion in the accounts of the month in which the transaction occurs, the amount of the item shall be estimated and in such form charged or credited to operating accounts and credited to balance-sheet account No. 78 [778], "Other unadjusted credits," or charged to balance-sheet account No. 727, "Other unadjusted debits," as may be appropriate, the necessary adjustments being made later when the item is audited. The carrier is not required to anticipate minor items which would not appreciably affect the operating accounts. (Rec. 63.)

In an order made and issued by the Commission in a proceeding entitled "In the Matter of a Uniform System of Accounts to be Kept by Steam Roads,"

dated April 26, 1921, and effective on and after January 1, 1921, it is, among other things, provided:

> * * * If, on account of claims for personal injury or loss and damage being unsettled at the close of the year, the accounts for such expenses are not adjusted, the balances carried forward in the operating reserve account shall be analyzed as provided for in section 20 of these instructions.
>
> Charges for stationery and printing and for advertising for a fiscal year shall be adjusted to the actual expenses. (Rec. 63–64.)

Since, in the ordinary course of business, sums of money paid by a carrier on account of claims like those referred to by appellant are included in the carrier's accounts for the years, respectively, in which the payments are made, regardless of the dates upon which the claims accrue, it appears to be a reasonable assumption that there are included in the reports made to the Commission by appellant, for the periods covered by the orders of the Commission involved in this case, sums of money paid by appellant during those periods on account of claims which accrued in some prior period or periods.

Pertinent language contained in the opinion of the lower court is:

> We do not understand that the validity of a tax or exaction based upon yearly income, or an excess thereof over a stated per cent, is dependent upon it being permissible, in ascertaining such income or such excess, to deduct from the amount of gross income received

> during the year both what is paid during the year in discharging liabilities previously incurred and also an amount to cover liabilities incurred during the year which remain unliquidated at the end of the year and when the return is made. Where the right to claim an overcharge exists, the repayment of such overcharge would be a charge against the gross income of the year when paid, as an expense of that year, just as payments made in the year 1922 on judgments rendered against a carrier are reckoned as an expense of that year notwithstanding the claim originated in an earlier year. It is not sufficiently probable that there will be such differences in the income of succeeding years as to make it likely that this method of dealing with this subject would not average itself. What are proper deductions to be made from gross income in ascertaining net income for a given period is a matter for legislative determination. (Rec. 69.)

The correctness of the opinion expressed by the lower court in the sentence last above quoted is called in question by No. 10 of appellant's assignments of error, which reads:

> In holding and deciding that what are proper deductions to be made from gross income for the ascertainment of net income for a given period is a matter for legislative rather than judicial determination. (Rec. 73.)

We think it is apparent that the lower court simply intended to and did hold that the subject

matter referred to is within the power conferred upon the legislative branch of the Government, and that action taken by the legislative branch in connection with such matter will be reviewed in court only for the purpose of determining whether it is in violation of the Constitution, or fails to comply with statutory authority, or is arbitrary, within the judicial meaning of that term. Thus interpreted it is in accordance with the ruling of this court in *Procter & Gamble* v. *United States*, 225 U. S. 282, 297–298.

VI.

INCOME DERIVED BY APPELLANT FROM INTRASTATE TRAFFIC MAY PROPERLY BE INCLUDED IN THE BASIS UPON WHICH APPELLANT'S EXCESS NET RAILWAY OPERATING INCOME IS COMPUTED.

In connection with the subject matter of the above heading, we quote from subdivision (*d*) of paragraph thirteen of the petition as follows:

> Complainant avers that a large and substantial proportion of the income earned or received by it and reflected in each and both of said reports as made to the Commission arose and accrued solely for and on account of rates, tolls, fares, and charges for the transportation of passengers and freight in intrastate commerce, conducted wholly within the State of Texas; that it is not within the power of Congress to take from complainant the earnings, or any part of the earnings, accruing to complainant from purely intrastate commerce; that to do so would be in violation of the tenth amendment of the Constitution of

> the United States, and any law seeking so to do would be wholly void; * * *. (Rec. 13–14.)

Upon this point the ruling of the lower court was as follows:

> That this levy is made on excess profits derived from intrastate as well as from interstate traffic is not a sound objection. Regarded as a tax levied by the Government it can be measured by the entire profit of the railway as well as by a percentage on that part of the surplus net income derived from interstate business. (Rec. 68.)

A contention similar to the one made here by appellant was made by counsel for forty-five States in *Railroad Commission of Wisconsin, et al.* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 578; and in replying thereto this court, speaking by Mr. Chief Justice Taft, said:

> * * * The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. * * *. (Id. 586.)
>
> Counsel for appellants are driven by the logic of their position to maintain that the valuation required for the purposes of section 15a to be ascertained pursuant to section 19a of the interstate commerce act (37 Stat. 701; amended 41 Stat. 493), is to be only of that part of the property and equipment of the interstate carriers which is used in commerce among the States and must be segregated from

that used in intrastate commerce. This is contrary to the construction which since the enactment of section 19a, March 1, 1913, the Commission has put upon that section in carrying out its injunction. It is inadmissible. The language of section 15a refutes such interpretation. The percentage is to be calculated on "the aggregate value of the railway property of such carriers held for and used in the service of transportation." To impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it. They certainly do not.

It is objected here, as it was in the *Shreveport case*, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original interstate commerce act repeated in the amending acts, that the Commission is not to regulate traffic wholly within a State. To this, the same answer must be made as was made in the *Shreveport case* (234 U. S. 342, 358), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The

same men conduct them. Commerce is a unit and does not regard State lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, can not exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of State authority or a violation of the proviso. (Id. 587–588.)

* * * Congress in its control of its interstate commerce system is seeking in the transportation act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing State work. The affirmative power of Congress in developing interstate commerce agencies is clear. *Wilson* v. *Shaw*, 204 U. S. 24; *Luxton* v. *North River Bridge Co.* 153 U. S. 525; *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1, 39. In such development, it can impose any reasonable condition on a State's use of interstate car-

> riers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field. (Id. 589–590.)

Appellant admits that it is engaged in the transportation of passengers and property by railroad in interstate and foreign commerce (Rec. 2); and the control of which it complains, exercised by Congress, directly, and through its agent, the Interstate Commerce Commission, is only incidental and for the purpose of providing and maintaining an adequate national railway transportation system. As shown by the above quotation from the decision of this court in the *Wisconsin case*, such control may not properly be regarded as a violation of the Constitution of the United States. In this connection it will be observed that the provisions of section 15a relating to excess net railway operating income, taken together, simply constitute one step in the scheme of regulation devised by Congress in an effort to provide necessary and appropriate facilities for the transportation of passengers and property in interstate and foreign commerce even though also used in intrastate commerce.

VII.

THE PROVISIONS OF SECTION 15a RELATING TO EXCESS NET RAILWAY OPERATING INCOME ARE CONSTITUTIONAL AND THE ORDERS OF THE COMMISSION ARE VALID.

Under former headings we have discussed separately reasons advanced by appellant in support of its contentions that the provisions of section 15a of the interstate commerce act, relating to excess net railway

operating income, which were added to that act by section 422 of the transportation act, are unconstitutional, and that the orders of the Commission are invalid, but the allegations contained in the petition clearly show, we submit, that the correctness of the contentions concerning the orders is wholly dependent upon the correctness of the contentions pertaining to said provisions of section 15a. In other words, if the court concludes that the views advanced by appellant in connection with the provisio[illegible] of law referred to are unsound, it will necessarily re[illegible]n a like conclusion concerning appellant's contention that the orders are invalid.

At the time matters covered by the transportation act were being discussed Congress was confronted with the necessity of preserving and strengthening the interstate common carriers of the country and making them efficient and serviceable agencies for the transportation of interstate and foreign commerce, used also for the transportation of intrastate commerce. Under these circumstances we think it is obvious that the most important matter presented for consideration was the means by which the necessary railway operating revenues might be secured. After several months of discussion, deliberation, and reflection, Congress perfected and put into operation the plan described in said section 15a, which may be briefly summarized as follows:

In paragraph (1) the terms "rates," "carrier," and "net railway operating income" are defined.

In paragraph (2) the Commission is authorized and required to initiate, modify, establish, and adjust rates so that carriers as a whole, or as a whole in each of such rate groups or territories as the Commission may from time to time designate, will "earn an aggregate net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railroad property of such carriers held for and used in the service of transportation."

In paragraph (3) the Commission is authorized and required to determine and publish the fair return, but for the two years ended March 1, 1922, the return is fixed by Congress at 5½ per cent of such aggregate value, except that the Commission is authorized to increase the return to 6 per cent.

In paragraph (4) the manner in which the aggregate value is to be fixed by the Commission is described.

Paragraphs (5) to (9), inclusive, relate to the control and disposition of net railway operating income received by a carrier in excess of 6 per cent of the value of the railway property held for and used by the carrier in the service of transportation.

Paragraphs (10) to (16), inclusive, relate to the use by the Commission for transportation purposes of the railroad contingent fund, in which one-half of the excess net railway operating income is to be placed.

The full text of paragraph (17) is as follows:

> The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

And paragraph (18) authorizes the Commission to grant permission to a carrier to retain for a period of time not exceeding ten years' earnings derived by it from the operation of a new line of railroad in excess of said fair return.

As a result of the investigation made by it in the premises, Congress concluded that the scheme of regulation provided for in section 15a would enable some carriers to earn more than a fair return upon the values of the properties used by them, respectively, in serving the general public, and this conclusion it expressed in paragraph (5), which reads:

> Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of trans-

portation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

For the purpose of enabling carriers to pay dividends, etc., in lean years, as well as in more prosperous years, Congress provided in paragraphs (7) and (8) as follows:

> For the purpose of paying dividends or interest on its stocks, bonds or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.
>
> Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under

paragraph (6) may be used by it for any lawful purpose.

In holding the provisions of section 15a, above mentioned, relating to the establishment and maintenance of a reserve fund, to be within the power of Congress, the lower court said:

> As to the requirement that the rail carriers subject to the Transportation Act shall devote the remaining fifty per cent. excess over said 6 per cent to certain purposes, this does not take away any part of said fund from the carrier earning it. It only requires the carrier to hold and use it for certain of its corporate purposes.
>
> We think that this is within the powers of Congress to order. *Wilson* v. *New, Receiver*, 243 U. S. 332, 347. (Rec. 70.)

This holding of the lower court is the subject-matter of No. 17 of appellant's assignments of error, which reads:

> In holding and deciding that, as to Appellant, Section 15a of said Act, and said orders of the Interstate Commerce Commission, and each of them, requiring a certain portion of Appellant's earnings to be placed in a reserve fund, and prohibiting the use of such fund except for certain limited purposes, are not as to Appellant null and void, because taking Appellant's private property without due process of law and without compensation in contravention of the Fifth Amendment to the Constitution of the United States. (Rec. 74.)

In *McCulloch* v. *Maryland*, 4 Wheaton 316, this court, in speaking of the power Congress may properly exercise under the Constitution, said:

> * * * Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. (Id. 420.)

Measured by this test, we think it is apparent that the holding of the lower court referred to is correct and must be sustained. As stated by this court in the *Wisconsin case, supra* (Id. 585), the end sought to be accomplished by Congress in framing the transportation act, including the provisions of section 15a above mentioned, was to maintain an adequate national railway system. That this end is legitimate will not, we feel certain, be controverted, and that the provisions referred to are appropriate and plainly adapted to that end appears to us to be equally clear.

It will be seen that in prescribing rates the Commission is both authorized and required to use as a basis the aggregate value of the railroad property of the carriers held for and used in the service of transportation, as a whole, or as a whole in each of such rate groups or territories as the Commission may from time to time designate, instead of, and as distinguished from, the value of the property of an individual carrier. It is therefore apparent that appellant's contention, that, as between appellant and the Commission, the general level of rates in the

group where appellant's railroad is located must be presumed to be reasonable, is unsound and can not be sustained.

In holding to be constitutional the provisions of paragraph (6) of section 15a, complained of by appellant, and which are usually called the recapture provisions of the transportation act, the lower court, among other things, said:

> It would not be seriously questioned that in returning the railroads to their owners, after their use during the World War, the United States could have made an appropriation creating a revolving fund, and prescribed for its use in aiding railroads as is now provided in the Transportation Act of 1920.
>
> It would be a reasonable exercise of its right to thus partly compensate for the use of their property, used in the manner above recited, during the period of Government operation.
>
> Furthermore, by the Act of June 8, 1872, all of the railroads of the country are declared to be post roads. Rev. Sts. Sec. 3964 (U. S. Comp. Sts. Sec. 7456).
>
> By the Constitution the Congress is expressly empowered "to establish post offices and post roads." Const. Art. I, Sec. 8, cl. 7.
>
> Under this and other like powers the Congress has aided in construction of the transcontinental lines.
>
> These powers would authorize aid to be extended in the manner prescribed in the Transportation Act to keep up and make efficient such railroads as needed the same.

The only question left, therefore, is as to the Government's right to raise this fund, so to be used, by requiring the railroads to pay to it one-half of the excess earned by them over certain percentages. It will be noted that no road earning any excess is relieved from this assessment.

The power of Congress to regulate interstate and foreign commerce includes power to adopt measures to aid and encourage such commerce. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 204; *Mobile County* v. *Kimball*, 102 U. S. 691, 696. To promote those objects it may exercise its power of taxation. *License Tax Cases*, 5 Wal. 462, 470. It is not doubted that funds raised by legal taxes or exactions may be devoted to the purposes for which the revolving fund provided for is required to be used.

While the exaction in question is not denominated a tax it is in effect an excise tax levied on all carriers subject to the Transportation Act, payable from surplus earnings. In other words, the carriers are exempt from this tax who do not earn a certain per cent on their invested capital, and all are exempt up to this percentage of net earnings. All whose earnings exceed that amount are required to pay the same percentage of the excess to provide a given fund. In speaking of the raising of revenues for weaker lines, the Supreme Court, in The New England Divisions Case, says:

"In other words, the additional revenues needed were raised partly by a direct, partly by an indirect tax."

> We see no reason why the United States can not measure this tax by the excess profit realized over a specified percentage.
>
> It is the nature of the demand and not its name as given in the statute which determines if it is in truth a tax. *Helwig* v. *United States*, 188 U. S. 605, 613; *Fontenot* v. *Accardo*, 278 Fed. 871, 874. (Rec. 67–68.)
>
> The Transportation Act provides that this fifty per cent of the excess over 6 per cent is not collected, or held, by the carrier for its own account, but as trustee for the United States, to whom it is to be paid. (Rec. 69.)
>
> It is not perceived what right the complainant has, in this situation, to decline to recognize its liability to the United States and make payment to the Interstate Commerce Commission, as its designated agent. (Rec. 70.)

Regardless, however, of the power of Congress under the Constitution to provide for the levying and collecting of taxes, we think it is apparent that the provisions of section 15a, whose validity is called in question by appellant, may be upheld as portions of a scheme of regulation of interstate and foreign commerce which Congress has a constitutional right to create and put in force.

That the power to prescribe and otherwise regulate the rates, fares, and charges of common carriers engaged in the transportation of passengers and property in interstate and foreign commerce is legislative in character, and that Congress, directly and through such agencies as it may from time to

time designate for the purpose, may exercise such power fully and completely, is so well settled by decisions of the Federal courts that a citation of authorities in this connection does not appear to us to be necessary. A careful review of pertinent cases is contained in the decision of this court in *Houston, East and West Texas Railway Company* v. *United States*, 234 U. S. 342, where, among other things, the court said:

> First. It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. * * *. (Id. 350.)
>
> Congress is empowered to regulate—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*County of Mobile* v. *Kimball, supra*); "to foster, protect, control and restrain" (*Second Employers' Liability Cases, supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of

> conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard, or destroy it. * * * (Id. 351.)

The general rule to be followed by courts in cases like the one under consideration here was stated by Mr. Chief Justice Fuller in *McChord* v. *Louisville & Nashville Railroad Company*, 183 U. S. 483, as follows:

> * * * The fixing of rates is essentially legislative in its character, and the general rule is that legislative action can not be interfered with by injunction. (Id. 495.)

Because of the facts and circumstances disclosed by the record in this case, and in view of the court decisions to which we have called attention, we are unable to see how this court can sustain either the contention of appellant that the provisions of section 15a relating to excess net railway operating income are unconstitutional, or its contention that the orders of the Commission are invalid, unless the court concludes that an application of the limitations prescribed by Congress and contained in paragraph (6) of said section would result in such a confiscation of appellant's property as is prohibited by the Constitution. We have shown that in no case do the limitations confine a carrier to a return of less than 6 per cent per annum upon the value of the

property held for and used by it in the service of transportation, and we are not aware of any decision of a Federal court wherein like limitations prescribed by Congress have been held to be unconstitutional. We are therefore of opinion that further discussion by us in this connection is not necessary and would not be appropriate.

For the reasons above set forth we insist that the appeal in this case should be dismissed.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellee.

NOVEMBER, 1923.

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